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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

DALE J. GERO,
PLAINTIFF-PETITIONER,

v.

ANTHONY J. PIRES and
CITY OF PITTSFIELD,
DEFENDANTS-RESPONDENTS.

A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does an innocent person arrested on a so-called alias warrant which lacks any physical description of the intended arrestee have a right to damages under 42 U.S.C. §1983 based on a violation of the Fourth Amendment prohibition against the issuance of arrest warrants not "particularly describing. . . the persons. . . to be seized"?

2. Should *Baker* v. *McCollan*, which holds that there is no constitutional violation where an innocent person mistakenly named in a warrant is arrested, be extended to a situation where an innocent person not named in the warrant is arrested?

3. In an action under 42 U.S.C. §1983 by an innocent person arrested on an alias warrant which lacks any physical description of the intended arrestee, is the determination of whether there was probable cause for the arrest apart from the warrant a question of fact for the jury?

PARTIES

The parties to the appeal to the United States Court of Appeals for the First Circuit were Dale J. Gero, appellant in Civil Action No. 83-1837 and appellee in Civil Action No. 83-1838, Anthony J. Pires, appellee in Civil Action No. 83-1837 and the City of Pittsfield, appellant in Civil Action No. 83-1838.

TABLE OF CONTENTS

	Page
Table of Authorities	V
Reports	1
Statement of Jurisdiction	2
Relevant Statutes	2
Statement of the Case	3
Reasons for Grant of Writ	7
I. There Is a Split in the Courts of Appeal as to the Validity of Arrests of Innocent Persons Accomplished Under Alias Warrants That Contain No Description of the Person Intended To Be Arrested	7
II. In Light of *United States* v. *Leon* and *Illinois* v. *Gates* Where an Innocent Person Is Arrested Under a Warrant Which Does Not Name or Describe Him, Imposition of Civil Liability Under 42 U.S.C. §1983 Is Necessary To Deter Individual and Systemic Police Misconduct Violative of the Fourth Amendment	12
III. In Holding That Probable Cause to Arrest Mr. Gero Without a Warrant Existed as a Matter of Law the United States Court of Appeals for the First Circuit Departed From the Accepted and Usual Course of Judicial Proceedings	15
Conclusion	18

APPENDIX

Page

Opinion of the United States Court of Appeals for the First Circuit, July 27, 1984, 740 F.2d 78 (1st Cir. 1984) A-1

Judgment of the United States Court of Appeals for the First Circuit, Civil Action No. 83-1837, July 27, 1984 (1st Cir. 1984) B-1

Judgment of the United States Court of Appeals for the First Circuit, Civil Action No. 83-1838, July 27, 1984 (1st Cir. 1984) C-1

Order of the United States Court of Appeals for the First Circuit on Petition for Rehearing En Banc, August 29, 1984 ..... D-1

Memorandum and Order of the United States District Court for the District of Massachusetts, September 29, 1983, slip op. E-1

Plaintiff's Exhibit 21, Warrant and Subpoena F-1

Plaintiff's Exhibit 8, Investigating Officer's Report, Assault and Battery G-1

Plaintiff's Exhibit 7, Statement of Cynthia Phiffer H-1

Plaintiff's Exhibit 32, Telex from Springfield Police Department to Arizona Department of Public Safety, Dated November 12, 1978 ..... J-1

Plaintiff's Exhibit 36, Telex from Pittsfield Police Department to Arizona Department of Public Safety, Dated November 13, 1978 ..... K-1

Excerpts from Trial Testimony L-1

Excerpts from Deposition of Richard A. Henault M-1

TABLE OF AUTHORITIES

Cases

	Page
Baker v. *McCollan*, 443 U.S. 137 (1979)	10
B.C.R. Transport Co. v. *Fontaine*, 727 F.2d 7 (1st Cir. 1984)	15
Beck v. *Ohio*, 379 U.S. 89 (1964)	16
Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)	10
Brinegar v. *United States*, 338 U.S. 160 (1949)	14
Carlson v. *Green*, 446 U.S. 14 (1980)	14
Commonwealth v. *Crotty*, 92 Mass. (10 Allen) 403 (1865), *overruled on other grounds*, 388 Mass. 596, 447 N.E.2d 1224 (1983)	10
Dabbs v. *State*, 59 N.Y.2d 213, 451 N.E.2d 186, 464 N.Y.S.2d 428 (1983)	10
Florida v. *Royer*, 103 S.Ct. 1319 (1983)	11, 17
Galloway v. *United States*, 319 U.S. 372 (1943)	17
Grant v. *State*, 152 Ga. App. 258, 262 S.E.2d 553 (1979)	10
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	14
Hill v. *California*, 401 U.S. 797 (1971)	10
Hubbard v. *Faros Fisheries, Inc.*, 626 F.2d 196 (1st Cir. 1980)	17
Illinois v. *Gates*, 103 S.Ct. 2317 (1983)	12, 13
Jordan v. *C.I.T. Corp.*, 302 Mass. 281, 19 N.E.2d 5 (1939)	10
Llanguno v. *Mingey*, 739 F.2d 1186 (7th Cir. 1984)	8, 17
Massachusetts v. *Sheppard*, 104 S.Ct. 3424 (1984)	12, 14
McDermott v. *W. T. Grant Co.*, 313 Mass. 736, 49 N.E.2d 115 (1943)	16
Owen v. *City of Independence*, 445 U.S. 622 (1980)	15
People v. *Montoya*, 255 Cal. App. 2d 137, 63 Cal. Rptr. 73 (1967), *cert. denied*, 390 U.S. 1007 (1968)	10
Pierson v. *Ray*, 386 U.S. 547 (1967)	15
Powe v. *City of Chicago*, 664 F.2d 639 (7th Cir. 1981)	7

Page

State v. *Staes*, 92 Ill. App. 2d 156, 235 N.E.2d 882 (1939) 10
United States v. *Doe*, 703 F.2d 745 (3d Cir. 1983).... 12, 16
United States v. *Donovan*, 429 U.S. 413 (1977)..... 10
United States v. *Leon*, 104 S.Ct. 3405 (1984)....10, 12, 13, 14
United States v. *Mahoney*, 712 F.2d 956 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 3590 (1984)..... 12
United States v. *$1,058.00 In United States Currency*, 210 F. Supp. 45 (W.D. Pa. 1962), *aff'd*, 323 F.2d 211 (3d Cir. 1963)..... 12
United States v. *Rosario*, 543 F.2d 6 (2d Cir. 1976)..... 16
United States v. *Ross*, 102 S.Ct. 2157 (1983)..... 13
United States v. *Swanner*, 237 F. Supp. 69 (E.D. Tenn. 1964)..... 12
Wanger v. *Bonner*, 621 F.2d 675 (5th Cir. 1980)..... 12
West v. *Cabell*, 153 U.S. 78 (1894)..... 8, 9
Winfield v. *United States*, 430 F. Supp. 912 (S.D.N.Y. 1977)..... 16, 17

Statutes and Constitutional Provisions

U.S. Const. Amend. IV..... 9, 13, 24
42 U.S.C. §1983..... 2, 12, 14

Other Authorities

Berner, *Fourth Amendment Enforcement Models: Analysis and Proposal*, 16 Val. U. L. Rev. 215 (1982)..... 13
Eisenberg, *Section 1983: Doctrinal Foundations and An Empirical Study*, 67 Cornell L. Rev. 482 (1982)..... 14
Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment during the 1982 Term*, 62 N.C. L. Rev. 329 (1984)..... 11, 15

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A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit. entered in this proceeding on July 27, 1984.

Reports

The decision of the United States District Court for the District of Massachusetts on the defendants' motions for judgment notwithstanding the verdict is not reported. The decision of the United States Court of Appeals for the First Circuit is reported at 740 F.2d 78 (1st Cir. 1984).

Statement of Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit entered on July 27, 1984. Dale J. Gero's Petition for Rehearing *En Banc* was denied by an Order of the Court of Appeals which entered on August 29, 1984. The petitioner seeks review of the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

Relevant Statutes

The constitutional provisions and statutes involved in this case are as follows:

U.S. Const. amend IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

The plaintiff and petitioner herein Dale J. Gero ("Mr. Gero") was arrested by police officers of the defendant and respondent herein City of Pittsfield ("Pittsfield") on an alias warrant which did not name him and which contained no description of the person sought by the police. Mr. Gero, himself a former Arizona police officer, was totally innocent of any wrongdoing and was not the suspect sought by the police.

In 1979, Officers Richard A. Henault and Edward A. Sherman were detectives with, and the defendant and respondent herein Anthony J. Pires ("Captain Pires") was Chief of Detectives of the Pittsfield Police Department. In October and November of 1979, the police were investigating two unrelated criminal incidents involving a single suspect who used as many as nine aliases. (A. at J-1, K-1) The first incident ("the Phiffer incident"), in which no warrant or complaint issued, involved an alleged misdemeanor assault and battery on October 16, 1979, reported by Cynthia Phiffer who knew her assailant as "D.J." or "J.D." (A. at H-1, -2) She described his arms as being "all scarred from cuts." (A. at H-2) The second incident ("the Sayers/Decelles/Sinopoli incident") which occurred on November 1, 1979, was an alleged felony assault with intent to murder committed on Gene Sayers, William Decelles and David Sinopoli. During the investigation of the Sayers/Decelles/Sinopoli incident the police learned the suspect used aliases including Eric Walters and J.D. The police concluded that the suspect also used other aliases including John Charles Lawrence, Lee Barrett, Jerry Dean McMurray, Jerry Walter Hiel, Raymond Roel Palmer, John Dean Walters, and J.D. Walters. According to the Pittsfield Police, they were "all the same man." (A. at J-11) The police also obtained various physical descriptions of the suspect which included identifying scars on the forearm and other physical characteristics. At first no connection was made between the Phiffer incident and the Sayers/Decelles/Sinopoli incident.

On November 3, 1979, the police obtained an arrest warrant for the Sayers/Decelles/Sinopoli incident naming "Lee Barrett a/k/a Erick Walters." (A. at F-1).[1] Officer Henault obtained the warrants by swearing out complaints against "Lee Barrett a/k/a Erick Walters" but these complaints were never docketed and Captain Pires later destroyed them. No physical description was included on the warrant nor did the warrant contain any other information for the identification of the suspect, such as an address. (A. at F-1) Even though the police had a photograph of the suspect, at the time of Mr. Gero's arrest it was not attached to the warrant. (A. at A-6) Despite a written policy of the Pittsfield Police Department prohibiting the use of "John Doe" warrants, Captain Pires testified at trial that even if the Pittsfield Police Department *did not know* the suspect's name, and even if they had a description of and 45 aliases for the suspect, it was their custom, policy and practice to obtain a warrant listing the aliases used "in that particular offense" but without a description of the suspect. (A. at L-3).

On November 13, 1979, Cynthia Phiffer was in the vicinity of the Pittsfield police station when she spotted Mr. Gero in his truck some distance away. Erroneously believing Mr. Gero to be her assailant, Ms. Phiffer went to the police and told them she had just seen "J.D." (A. at L-4) Despite the fact that the police had never previously connected the Phiffer incident to the Sayers/Decelles/Sinopoli incident, upon being informed that Ms. Phiffer had seen *"J.D"* they obtained the warrant naming *"Lee Barrett a/k/a Erick Walters"* and, after Ms. Phiffer pointed out the truck, arrested *Dale J. Gero* at gunpoint. After Mr. Gero got out of his truck and was frisked, he was placed under arrest "on the basis of the warrant." (A. at M-1).

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[1] While various police reports filed in the Sayers/Decelles/Sinopoli incident list one of the suspect's aliases as "Eric" or "Eric Walters," that name was spelled "Erick Walters" on the warrant.

During the arrest, Mr. Gero identified himself as Dale Gero of Dalton, Massachusetts, and this was confirmed by the twelve pieces of identification contained in Mr. Gero's wallet and examined by the officers. While Mr. Gero was being arrested Ms. Phiffer hid behind the back seat of a police cruiser. She testified at trial that she never saw Mr. Gero clearly and that if she had she would have known he was not her assailant. (A. at L-2). Mr. Gero's physical characteristics differed in several material respects from those of the individual sought:

	The Suspect	*Mr. Gero*
Height	6'2"	5'11"
Weight	200 lbs.	165 lbs.
Hair color	Blond	Brown
Identifying Scars	Left Forearm	None

Despite repeated assertions of his identity by Mr. Gero and his counsel, and corroboration of his identity by the contents of his wallet, the Pittsfield police caused Mr. Gero to be incarcerated. During the booking procedure, at least one officer acknowledged that Dale Gero was the "real name" of the person arrested. However, the police disregarded the arrestee's name on the grounds that "when you have as many aliases as he does" the name being used "doesn't mean anything." (A. at L-1). The following day, November 14, 1979, prior to Mr. Gero's arraignment Captain Pires caused the original criminal complaints naming "Lee Barrett a/k/a Erick Walters" to be destroyed. New complaints were prepared in which Mr. Gero's name was added to those of Lee Barrett and Erick Walters and then backdated to the time the original complaints were sworn. Mr. Gero was then arraigned on charges of three counts of assault with intent to commit murder. Mr. Gero was later released on bail. Despite repeated requests by Mr. Gero for an in-person line-up, a week elapsed before the police arranged a show-up with the suspect's girlfriend. She immediately identified Mr. Gero as not being J.D., Eric Walters or Lee Barrett, and the charges against Mr. Gero were dismissed.

Mr. Gero sued the arresting officers Henault and Sherman, Captain Pires and Pittsfield under 42 U.S.C. §1983. At the trial, the District Court (Freedman, J.) ruled that the warrant under which Mr. Gero was arrested was constitutionally invalid to arrest Mr. Gero. The jury, having been fully instructed on the defenses of probable cause and good faith (the latter being available only to the individual defendants) returned separate verdicts in Mr. Gero's favor against Captain Pires and Pittsfield and returned verdicts in favor of Officers Henault and Sherman. On the defendants' motions for judgment notwithstanding the verdict the District Court held that the evidence was "not . . . so overwhelming as to require a finding of probable cause." (A. at E-5) However, the District Court held that Mr. Gero failed to show that Captain Pires acted with "reckless and callous indifference" to the plaintiff's rights and therefore granted the motion for judgment notwithstanding the verdict for Captain Pires. (A. at E-6). Judgment on the jury verdict against Pittsfield was entered on August 29, 1983.

Mr. Gero and Pittsfield took cross-appeals to the United States Court of Appeals for the First Circuit. Mr. Gero argued that the District Court had erred in requiring the plaintiff to show that Captain Pires acted with callous and reckless disregard of Mr. Gero's rights. Pittsfield argued that the District Court had erred in holding the warrant to be constitutionally insufficient to arrest Mr. Gero and that the District Court should have found that probable cause existed to arrest Mr. Gero as a matter of law.

The Court of Appeals, in a decision entered on July 27, 1984, reversed in part and affirmed in part on other grounds the decision of the District Court. (A. at A-2) The Court of Appeals held that the alias warrant naming "Lee Barrett a/k/a Erick Walters" was sufficient to arrest Mr. Gero because the warrant gave an alias, together with the real name, of the person intended to be arrested; that is, the warrant named Eric

Walters. (A. at A-9). The Court of Appeals also held that, as a matter of law, the police had probable cause to arrest Mr. Gero without a warrant. (A. at A-11).

The plaintiff's timely petition for rehearing *en banc* was denied by the Court of Appeals in an order which entered on August 29, 1984.

Reasons for Grant of Writ

I. There Is a Split in the Circuit Courts of Appeal as to the Validity of Arrests of Innocent Persons Accomplished Under Alias Warrants That Contain No Description of the Person Intended To Be Arrested.

There is a division between the United States Courts of Appeal for the Seventh and First Circuits concerning the validity of arrests of innocent persons accomplished under alias warrants which do not unequivocally name the person to be arrested and do not describe the person sought. The Seventh Circuit has held that such arrests violate the Fourth Amendment requirement that "no Warrants shall issue, but upon probable cause...particularly describing...the persons or things to be seized." *Powe* v. *City of Chicago*, 664 F.2d 639, 647 (7th Cir. 1981). This holding is supported by holdings in cases in the Third and Fifth Circuits and in various district courts including the District of Massachusetts in the present case. The First Circuit in this case has stated that the arrest of an innocent person not named in an alias warrant is valid where the warrant contains no description of the person sought as long as the warrant contains one of the names used by the suspect. This conflict in the circuits on an issue of great constitutional significance must be decided by this Court.

In the *Powe* case, the court held that an arrest accomplished under an alias warrant which did not contain a description of the intended arrestee was unconstitutional. 664 F.2d at 647-48. In *Powe*, the police arrested Andrew Powe, who was innocent of wrongdoing, under a warrant which named "An-

drew Powe, a/k/a Ernest Brooks." *Id.* at 642-43. The police were actually seeking to arrest someone using several aliases, including the name of Ernest Brooks, who had taken Mr. Powe's name as another alias. *Id.* The warrant under which Mr. Powe was arrested contained only the suspect's aliases and did not describe the suspect sought. *Id.* at 644. The Seventh Circuit engaged in an extensive analysis of the particularity requirement of the Fourth Amendment, *id.* at 645, and of this Court's holding in *West* v. *Cabell*, 153 U.S. 78 (1894), in which the man intended to be arrested (Vandy West) was arrested on a warrant which contained another name (James West). *See West* v. *Cabell*, 153 U.S. at 88. The *Powe* court held:

> "Where the authorities do not know, or are uncertain of the intended arrestee's name, then the name placed on the warrant—be it James West, or John Doe, or John Doe alias Bud Ferguson, or Andrew Powe a/k/a Ernest Brooks—is, to one degree or another, arbitrary. While an arrest warrant may constitutionally use such arbitrary name designations, it may *only* do so if, in addition to the name, it also gives some other description of the intended arrestee that is sufficient to identify him." 664 F.2d at 647 (emphasis in original).

Accord, *Llanguno* v. *Mingey*, 739 F.2d 1186, 1191 (7th Cir. 1984) ("The arresting officers must either know the suspect's name or have some description of him that is particular enough so that he may be identified with reasonable certainty").

In contrast to the decision of the Seventh Circuit, and this Court's holding in *West* v. *Cabell*, the First Circuit in the present case has held that the arrest of an innocent individual not intended to be arrested on an alias warrant that does not name him or contain any description of the individual actually sought is valid under the Fourth Amendment. The *Gero* court

stated that the police "were certain that the arrestee was named Lee Barrett or Eric Walters"[2] (A. at A-11) and that since the warrant named the suspect sought, it was valid to arrest Mr. Gero. This holding is at odds with settled constitutional principles with respect to arrest warrants. The Fourth Amendment requires that an arrest warrant particularly describe the person to be arrested. U.S. Const. Amend. IV. The seminal case of *West* v. *Cabell*, 153 U.S. 78 (1894), states that a person arrested on a warrant must be named on the warrant. *Id.* at 87. *West* has customarily been interpreted to mean that where the wrong person is arrested on a warrant that names someone else, such an arrest is unconstitutional and the arrestee may recover in an action for damages. *See*,

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[2] Obviously, the police in this case were *not* certain what the suspect's name was. If the warrant reflected their belief, they thought his "real" name was Lee Barrett and that "Erick Walters" was his only alias. While the First Circuit states that it did not "think it significant that the alias was the first name used on the warrant" (A. at A-10), the name placed first on the warrant apparently reflected the initial belief of the police as to which was the "real" name and which was the alias. Later, one police officer stated that he believed Dale Gero was the "real name" of the arrestee.

Additionally, the police were aware of numerous other aliases used by the suspect. Indeed, in a telex sent to Arizona the day before Mr. Gero's arrest, the Pittsfield police listed names used by the suspect in the Sayers/Decelles/Sinopoli incident. The first name listed was "John Charles Lawrence," the second was "Lee Barrett," the third was "Jerry Dean McMurray," and so forth. The name "Eric Walters" did not appear on the list, although the names "John Dean Walters" and "J.D. Walters" appeared and the name "Eric" appeared in a telex sent the following day.

Indeed, the First Circuit in effect conceded that the police knew that the suspect used numerous aliases:

> "We cannot accept plaintiff's contention that the addition of Gero's name to the three complaints after his arrest by Chief Pires showed that the police were uncertain at the time the warrant was issued of the name and identity of the person named in it. All it shows is that Pires thought Walters had another alias. *Based on what the police knew about Walters, this was not an unreasonable assumption.*" (A. at A-11) (emphasis added).

The reason that the police could make this assumption was that the suspect used so many aliases that the police did not know the suspect's true name. This was the reason the officer said the name of the person actually arrested in this case, Dale Gero, "doesn't mean anything."

e.g., *United States* v. *Donovan*, 429 U.S. 413, 428 n.16 (1979) (*West* "concerns the need for proper identification of the subject of the arrest warrant"); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395-96 (1971); *People* v. *Montoya*, 255 Cal. App. 2d 137, 141, 63 Cal. Rptr. 73 (1967), *cert. denied*, 390 U.S. 1007 (1968); *Grant* v. *State*, 152 Ga. App. 258, 259, 262 S.E.2d 553 (1979); *State* v. *Staes*, 92 Ill. App. 2d 156, 160, 235 N.E.2d 882 (1968); *Jordan* v. *C.I.T. Corp.*, 302 Mass. 281, 285, 19 N.E.2d 5 (1939); *Commonwealth* v. *Crotty*, 92 Mass. (10 Allen) 403 (1865), *overruled in part on other grounds*, 388 Mass. 596, 447 N.E.2d 1224 (1983); *Dabbs* v. *State*, 59 N.Y.2d 213, 451 N.E.2d 186, 464 N.Y.S.2d 428 (1983).

The First Circuit's statement that "[t]he decisive question is whether, if Walters had been arrested, he could have challenged the warrant," (A. at A-11), misses the point entirely. It was not Mr. Walters, but Mr. Gero, who was arrested. Mr. Walters' name was on the warrant; Mr. Gero's name was not. Mr. Walters was a suspect in a crime; Mr. Gero was not. The First Circuit has confused the fact pattern presented in this case (namely an innocent person is arrested on a warrant which names someone else) with a fact pattern in which the criminal actually sought is arrested on a warrant which contains some technical deficiency. Prior to *United States* v. *Leon*, 104 S.Ct. 3405, 3421 (1984), Mr. Walters might have been able to obtain suppression of evidence seized during an arrest on a warrant which contained some deficiency. *But see Hill* v. *California*, 401 U.S. 797, 804 (1971). The First Circuit, however, has blurred an essential distinction between the rights of the actual suspect raised in a criminal context, with the rights of an innocent person arrested on a warrant naming someone else raised in a civil context.

The First Circuit has also improperly extended *Baker* v. *McCollan*, 443 U.S. 137 (1979), to this case. While in *Gero*, the court, citing *Baker*, stated that the facts demonstrated a case

of "reasonable mistaken identity," (A. at A-12) there is a critical distinction between the two cases. In *Baker*, the police arrested an innocent person, but the individual so arrested was actually named on the warrant. 443 U.S. at 141. Because the person arrested was named on the warrant, there was no violation of the constitutional rights of the person arrested. *Id.* at 144-45. In this case, the person arrested, Mr. Gero, was not named on the warrant and nothing on the face of the warrant related to him. Given the Pittsfield Police Department's policy of issuing alias warrants without descriptions of the suspect and ignoring the names of the persons actually arrested, it is hardly surprising that innocent persons, such as Mr. Gero, would be arrested. In this case, the facts presented are the converse of those presented in *Baker*. It was not the name, but the lack of a particular description contained on the face of the warrant, which caused Mr. Gero, who did not match the suspect's physical characteristics, to be arrested. Indeed, the very purpose of the Fourth Amendment requirement of particularity is to avoid what occurred in this case, namely the unreasonable invasion of an innocent person's liberty. *Florida* v. *Royer*, 103 S.Ct. 1319, 1325 (1983). *See* Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C.L. Rev. 329, 356 (1984).

Despite the First Circuit's statements that "[t]his case is different than *Powe* v. *City of Chicago*," (A. at A-10), and that "[w]e need not decide...whether we agree with the *Powe* holding," (A. at A-11), it is evident that *Powe* and *Gero* present the same constitutional problem, namely the validity of the arrest of an innocent person on an alias warrant where the warrant does not describe the person sought.[3] The Seventh Circuit correctly held that an arrest under such a warrant is invalid. Decisions in analogous cases in the Third and Fifth

[3] If anything, this case is stronger than *Powe* because here the name of the person arrested did not appear on the warrant at all.

Circuits and in various district courts have supported the Seventh Circuit's view that, based on *West* v. *Cabell*, warrants which contain a "John Doe" designation and an alias of the suspect sought but no other particularizing information, such as a description, are invalid. *United States* v. *Mahoney*, 712 F.2d 956, 987, (5th Cir. 1983), *cert. denied*, 104 S.Ct. 3590 (1984) (arrest warrant for "John Doe a/k/a Dennis (LNU)" held invalid). *United States* v. *Doe*, 703 F.2d 745 (3d Cir. 1983) (arrest warrant for "John Doe a/k/a Ed" insufficient). *United States* v. *Swanne* , 237 F. Supp. 69, 72 (E.D. Tenn. 1964) (arrest warrant for "John Doe a/k/a Bud Ferguson" held invalid). *Cf. United States* v. *$1,058.00 In United States Currency*, 210 F. Supp. 45, 49 (W.D. Pa. 1962) ("John Doe" warrant supplemented with both the suspect's alias *and* a physical description satisfied Fourth Amendment requirement of particularity). *See generally Wanger* v. *Bonner*, 621 F.2d 675, 679 (5th Cir. 1980). Clearly there is a split in the circuits on this issue of constitutional significance which must be resolved by this Court.

II. In Light of *United States* v. *Leon* and *Illinois* v. *Gates* Where an Innocent Person Is Arrested Under a Warrant Which Does Not Name or Describe Him, Imposition of Civil Liability Under 42 U.S.C. §1983 Is Necessary To Deter Individual and Systemic Police Misconduct Violative of the Fourth Amendment.

This Court has, in a series of recent opinions, modified some of the methods previously used in the criminal context to enforce the Fourth Amendment's proscriptions against unreasonable searches and seizures. Thus, in *United States* v. *Leon*, 104 S.Ct. 3405, 3421 (1984), the Court adopted the so-called "good faith" exception to the exclusionary rule, holding that, where officers acting in good faith searched for and seized evidence on a technically deficient search warrant, the

evidence seized will not be excluded at trial. *Id.* at 3423. *Accord*, *Massachusetts* v. *Sheppard*, 104 S.Ct. 3424 (1984). Similarly, the Court in *Illinois* v. *Gates*, 103 S.Ct. 2317, 2328 (1983), abandoned the two-pronged *Aguilar-Spinelli* standards for determination of probable cause to issue a warrant in favor of a more flexible "totality of the circumstances" approach. *Id.* at 2328. *See also United States* v. *Ross*, 102 S.Ct. 2157, 2172 (1983) (warrantless search of lawfully stopped vehicle). The rationale for the modification of these developed Fourth Amendment principles was that the cost to society of the exclusionary rule and the *Aguilar-Spinelli* standards had been too high; "when law enforcement officers have acted in objective good faith . . . the magnitude of the benefit conferred . . . on guilty defendants offends basic concepts of the criminal justice system." *United States* v. *Leon*, 104 S.Ct. at 3413. *Accord*, *Illinois* v. *Gates*, 103 S.Ct. at 2342 (White, J., concurring) ("We will never know how many guilty defendants go free as a result of the rule's operation"). It is equally clear from *Leon* that the Court has concluded that the exclusionary rule did not serve the purpose of deterring individual and systemic police misconduct. 104 S.Ct. at 3416-18.

There is a risk that holdings such as those in *Leon* and *Gates* will reduce the incentive of police officers to observe the requirements of the Fourth Amendment. In light of these holdings, imposition of civil liability for systemic Fourth Amendment violations by the police is imperative to ensure that law enforcement officials observe basic constitutional guarantees afforded to the individual. The First Circuit's extension of the holding in *Baker* v. *McCollan* to situations where persons *not* named in warrants are arrested is thus particularly inappropriate at the present time.

Awards of damages for an invasion of an innocent individual's right to be free from unreasonable searches and seizures have few of the problems and costs inherent in the application of the exclusionary rule and, indeed, are beneficial in

numerous respects. Damages awarded to innocent persons whose Fourth Amendment rights have been violated does not involve the social cost of letting guilty persons go free. Furthermore, §1983 provides a mechanism for compensation to an innocent victim of police misconduct. Berner, *Fourth Amendment Enforcement Models: Analysis and Proposal*, 16 Val. U.L. Rev. 215, 249 (1982) (hereinafter "Berner"). Moreover, civil liability for municipalities and for officers found not to have acted in an objectively reasonable manner, *see Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-19 (1982), is appropriate to "punish" wrongdoers. Berner, *supra*, at 249. Additionally, imposition of damages pinpoints particular conduct and policies thus acting as a specific deterrent to both individual and systemic police misconduct violative of the Fourth Amendment. *Carlson* v. *Green*, 446 U.S. 14, 21 n.6 (1980). *See* Eisenberg, *Section 1983: Doctrinal Foundations and An Empirical Study*, 67 Cornell L.Rev. 482, 495 (1982).

In this case, a law-abiding individual was subjected to the "most effective weapon in the arsenal of every arbitrary government," *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949): Mr. Gero was arrested on a warrant naming an entirely different person and not describing the person sought. Mr. Gero's arrest occurred because of a policy of the Pittsfield Police Department of issuing alias warrants without descriptions of the suspects sought coupled with a complete indifference of the police to the names or identities of the individuals actually arrested on such warrants. In *Leon* and *Gates*, the Court implicitly recognized that where an innocent person is arrested not because of an individual mistake but because of an unconstitutional policy or practice of the police, the full panoply of remedies is available to the victim. *See United States* v. *Leon*, 104 S.Ct. at 3419, n.19 ("Our discussion . . . assumes, of course, that the officers properly executed the warrant and searched only those places and for those

objects that it was reasonable to believe were covered by the warrant"). *See also Massachusetts* v. *Sheppard*, 104 S.Ct. 3424 (1984).

In light of the broadened standards for issung warrants set forth in *Gates*, liability under 42 U.S.C. §1983 where the police have deprived an innocent person of his Fourth Amendment rights takes on special significance since permitting police misconduct to go unpunished "generate[s] [the] disrespect for the law and administration of justice" with which the Court was concerned in *Leon*. 104 S.Ct. at 3413 (quoting *Stone* v. *Powell*, 428 U.S. 465, 491 (1976)). "Since the primary function of the Fourth Amendment is to protect the innocent," Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. Rev. 329, 356 (1984), when an innocent person's right to be free from an unreasonable detention has been violated, §1983 *must* be available to ensure that the police comply with Fourth Amendment requirements.

III. In Holding That Probable Cause To Arrest Mr. Gero Without a Warrant Existed as a Matter of Law the United States Court of Appeals for the First Circuit Departed From the Accepted and Usual Course of Judicial Proceedings.

The First Circuit's holding that the Pittsfield police as a matter of law had probable cause to arrest Mr. Gero without a warrant is unsupported by the law, the evidence, the jury verdict, and the findings of the trial court and represents a departure from sound judicial principles.

The jury in this case found there was no probable cause to arrest Mr. Gero without a warrant. The jury was fully instructed as to both the good faith defense, available to only the individual defendants, *Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980), and the probable cause defense available

to all defendants. The jury returned a verdict in favor of Mr. Gero against Pittsfield and Captain Pires necessitating a conclusion that the jury found that there was no probable cause to arrest Mr. Gero.

It is well established that the issue of probable cause to arrest without a warrant is a question for the jury. *See Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); *B.C.R. Transport Co.* v. *Fontaine*, 727 F.2d 7, 10 (1st Cir. 1984). Thus, in *B.C.R. Transport*, the First Circuit found that even if the police were "acting on information provided *by an alleged victim of crime* this fact did not preclude the jury from finding that probable cause did not exist in this case." *Id.* (emphasis added).

The First Circuit's conclusion that as a matter of law there was probable cause to arrest Mr. Gero is simply wrong. The First Circuit concluded that "the cause of Mr. Gero's arrest . . . was . . . Phiffer's assertion that she had just seen Walters driving a blue pickup truck" (A. at A-11). However, Ms. Phiffer did not see Mr. Gero clearly and if she had she would have known he was not her assailant. (A. at L-2). Furthermore, Ms. Phiffer was in no way connected with the crime for which Mr. Gero was arrested. Ms. Phiffer was the victim of a misdemeanor assault and Mr. Gero was arrested for three counts of felony assault with intent to murder. Under Massachusetts law, the police, who did not witness the Phiffer incident, could *not* have arrested anyone for the Phiffer incident because it was only a misdemeanor, not committed in their presence. *McDermott* v. *W. T. Grant Co.*, 313 Mass. 736, 738, 49 N.E.2d 115, 116 (1943). Thus, Ms. Phiffer's identification could not possibly have constituted probable cause as a matter of law to arrest Mr. Gero.

Additionally, to the extent the First Circuit concluded that there was probable cause to arrest Mr. Gero based upon "the remarkable facial resemblance of Gero to the suspect"[4] the

[4] Any belief of the Pittsfield police that Mr. Gero was J.D., Eric Walters or Lee Barrett is not the equivalent of probable cause to arrest Mr. Gero for three counts of assault with intent to commit murder in the absence of a war-

court construed all the facts *against* Mr. Gero in violation of the applicable standard of appellate review. *See Galloway* v. *United States*, 319 U.S. 372, 395 (1943); *Hubbard* v. *Faros Fisheries, Inc.*, 626 F.2d 196, 199-200 (1st Cir. 1980). There were various physical discrepancies between Mr. Gero and the suspect sought, including significant differences in their height, weight and hair color and including identifying scars which the suspect had which Mr. Gero lacked. As the court stated in *Winfield* v. *United States*, 430 F. Supp. 912 (S.D.N.Y. 1977), "[c]ivil liability for false arrest where, because of physical resemblance, the officer mistakenly believes he was arresting the correct person, is not a new concept." *Id.* at 914.

Moreover, the court evidently bases its "finding of fact" that there was probable cause to arrest Mr. Gero in part on witness identifications of a photo line-up (which included a photo of Mr. Gero) *after* Mr. Gero's arrest. (A. at A-8). It is manifest that such identifications cannot possibly provide probable cause to support police actions which occurred several days previously. *See Florida* v. *Royer*, 103 S.Ct. 1319, 1329 (1983); *Llanguno* v. *Mingey*, 739 F.2d 1186, 1191 (7th Cir. 1984).

In sum, it is clear that reasonable people could find, and that the jury did find, that there was no probable cause to arrest Mr. Gero. The district court, in its opinion on the motions for judgment notwithstanding the verdict held that a finding of probable cause was not required and that

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rant naming Dale J. Gero. *See Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *United States* v. *Rosario*, 543 F.2d 6, 8 (2d Cir. 1976); *cf. United States* v. *Glover*, 725 F.2d 120, 122 (D.C. Cir. 1984). *See generally Winfield* v. *United States*, 430 F.Supp. 912, 914 (S.D.N.Y. 1977).

A fair reading of the facts in this case is that the police arrested Mr. Gero on the warrant supplemented by extrinsic facts not appearing on the warrant itself. It is well settled that the police may not use extrinsic evidence to support an arrest based on an invalid warrant. *United States* v. *Doe*, 703 F.2d 745, 749 (3d Cir. 1983).

Mr. Gero's proof that the arrest was based on the inadequate Phiffer identification was "persuasive." (A. at E-5). Even if the First Circuit were correct in concluding that the district court erred in ruling the warrant upon which Mr. Gero was arrested was valid, the proper procedure would have been to remand this case for a new trial, not to "find" that probable cause to arrest Mr. Gero existed as a matter of law.

Conclusion

For all the foregoing reasons, the plaintiff, petitioner herein, respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 83-1837, 83-1838.

DALE J. GERO,
PLAINTIFF, APPELLANT,

v.

RICHARD A. HENAULT, ET AL.,
DEFENDANTS, APPELLEES.

DALE J. GERO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

RICHARD A. HENAULT, ET AL.,
DEFENDANTS, APPELLEES.

CITY OF PITTSFIELD,
DEFENDANT, APPELLANT.

Before
CAMPBELL, *Chief Judge*,
COFFIN and BOWNES, *Circuit Judges*.

Francis D. Dibble, Jr., Springfield, Mass., with whom *Bulkley, Richardson & Gelinas*, Springfield, Mass., was on brief, for Dale G. Gero.
John F. Rogers, Pittsfield, Mass., with whom *Leonard H. Cohen*, and *Cain, Hibbard, Myers & Cook*, Pittsfield, Mass., were on brief, for appellee, Anthony J. Pires.
Edward M. Reilly, Pittsfield, Mass., for City of Pittsfield.

Argued May 8, 1984.
Decided July 27, 1984.
Rehearing and Rehearing En Banc
Denied Aug. 29, 1984.

BOWNES, *Circuit Judge.*

These appeals arise from a 42 U.S.C. § 1983 civil rights action and two pendent state law claims of assault and false imprisonment. Dale J. Gero and his wife, Donna, brought suit against Richard A. Henault and Edward Sherman, detectives in the police department of Pittsfield, Massachusetts, Anthony Pires, captain of detectives and acting chief of police at the time the alleged civil rights violation occurred, and the City of Pittsfield. After a jury trial, a verdict was returned for all defendants on the claims by Donna Gero. The jury found for the defendants Henault and Sherman in Dale J. Gero's action against them. It returned verdicts in favor of Gero in his actions against Pires and the City of Pittsfield. The district court set aside the verdict against Pires and entered judgment n.o.v. It denied Pittsfield's motions for judgment n.o.v. and for a new trial.

Gero appeals the judgment n.o.v. for Pires. The city appeals the court's refusal to grant its motions for judgment n.o.v. and for a new trial. Gero has not appealed the judgments on the verdicts in favor of Henault and Sherman. Donna Gero has not appealed.

We affirm the judgment n.o.v. for Pires, but for different reasons than those given by the district court, and reverse the judgment against the city.

The issue is whether the arrest of Dale J. Gero was the result of conduct illegal under the United States Constitution and/or state law arising from an approved policy and procedure followed by the Pittsfield Police Department or was simply a case of mistaken identity. The specific constitutional violation alleged was the issuance by the city and the use by the police of an invalid arrest warrant.

I. The Facts

Our review of the evidence is guided by two standards. On the judgment n.o.v. for Pires, the test is whether, as a matter of law, only one conclusion can be drawn. *Robinson* v. *Watts*

Detective Agency, Inc., 685 F.2d 729, 733 (1st Cir. 1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 728, 1191, 75 L.Ed.2d 436 (1983). *Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978). In the case against the city, we review the evidence and the inferences that can be fairly drawn from it in the light most favorable to the plaintiff Gero, the prevailing party. *Robinson* v. *Watts*, *supra*, at 732; *DeVasto* v. *Faherty*, 658 F.2d 859, 861 (1st Cir. 1981); *Engine Specialties* v. *Bombardier, Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979), *cert. denied*, 446 U.S. 983, 100 S.Ct. 2964, 64 L.Ed.2d 839 (1980).

We start with the testimony of Cynthia Phiffer. In early October 1979, Cynthia and her sister met a man called "J.D." at Danny's Bar in Pittsfield. After he had bought them a drink, Cynthia and her sister asked him to drive them home, which he did. On the drive home, J.D. said that his real name was Eric Walters, but that everybody called him J.D. He showed the women his forearms, one of which had scars across it. Walters told them that the scars were the result of a suicide attempt when he was in Walpole State Prison. He also said that he had guns and intended to rob a bank.

Walters and Phiffer met again by chance at Danny's Bar on October 15. This time the meeting was not friendly. Cynthia was playing pool; she looked across the room and thought that Walters was about to strike her sister, who was three or four months pregnant. Cynthia ran over to Walters and told him not to hit her sister, whereupon he promptly punched Cynthia in the jaw. Cynthia punched back, a fight ensued, and at one point Walters came after Cynthia with a knife. At the end of the fray, Cynthia had lost one tooth and two others were loosened. She went to the emergency room of the Pittsfield Hospital for medical treatment.

The next afternoon Cynthia went to the police station, gave a statement and signed an assault and battery complaint. She described her assailant as having the name J.D. (Eric)

Walters, being six feet two inches in height, weighing two hundred pounds, having shoulder length blonde hair with a possible beard and mustache, and with scars on the left forearm. The statement describes Walters' vehicle as a 1967 yellow van with Arizona license plates. In her statement, Phiffer said that on the ride home with Walters the week before the assault, he showed two handguns to her and her sister, "a snubnose 38 and a Bulldog 38."

The police files contained a memo dated October 22 stating that Cynthia Phiffer called and identified the man who assaulted her as Eric Walters, supposedly living with a girl named P[illegible], a member of a motorcycle group called the Warlocks, on Brown Street in Pittsfield.

The next date of significance is November 1, 1979, when Walters attacked one David Sinopoli with a club on the street outside of Danny's Bar. Sinopoli sought refuge in a truck owned and driven by a friend, Gene Sayers. Another companion, William Decelles, was also in the truck. Walters smashed a window of the truck with the club before it got started. Walters then chased the truck in a blue van; there were two others with him. Several rifle shots were fired from the van through the cab windows of the truck. Sometime during the chase, the truck rammed the radiator grille of the van. Sinopoli, Sayers and Decelles eventually eluded Walters.

The police had been alerted to the incident shortly after the chase started and later that night located and impounded the van. It still had a piece of the truck bumper in its grille. After properly obtaining a warrant based on the statements of Sinopoli, Sayers and Decelles and other witnesses, the police searched the van. They seized several bags of marijuana, a baseball bat with pieces of glass embedded in it, a number of rounds of rifle and handgun ammunition, including some .22 hollow point bullets, a prescription vial and a social security card bearing the name Lee Barrett, and several photographs. The van was registered to a woman in Phoenix, Arizona, and had Arizona license plates.

One of the photos taken from the van was inserted into an eight-photo lineup and shown to Sayers. He identified the photo as being that of the man who attacked Sinopoli with a club and drove the blue van. The photo was later determined to be of Eric Walters. The police made fifteen to twenty copies of Walters' photo and distributed them throughout the department.

On November 2, Officer Sporbert of the Pittsfield Police Department reported that he had previously stopped a yellow Ford van with Arizona license plates in the process of investigating an armed robbery of a store. The operator identified himself as Lee Barrett from Arizona. He claimed that he was living out of the van and had no local address. A computer check cleared both Barrett and the van. On November 3, Sporbert amended his report to state that the picture distributed was that of the person operating the yellow Ford van he had stopped.

On November 3, Detective Henault, who had been investigating the assault, chase and shooting involving Walters, went to the clerk-magistrate of the Pittsfield District Court and swore out three complaints for assault with intent to murder against "Lee Barrett a/k/a Erick Walters." Based on what he had been told by Henault, the clerk-magistrate determined that there was probable cause to issue an arrest warrant, and he did so, using the same names as on the complaints, "Lee Barrett a/k/a Erick Walters." No other descriptive information was stated on the face of the warrant. The arrest warrant was taken to the police station.

On November 13, Cynthia Phiffer ran into the police station and said that she just saw "J.D.—Eric Walters" driving a blue pickup truck. She was referred to Detectives Henault and Sherman who were working on the Walters case. Henault testified that when he heard Phiffer say that she saw "J.D. Walters," it suddenly "clicked" that the person who had assaulted her was the same one who had been involved in the

chase and shooting on November 1. Phiffer agreed to come with Henault and Sherman to help find the blue pickup truck and Walters. On the way out of the police station, Henault picked up the arrest warrant. There was no photo attached to it, but both Henault and Sherman were familiar with Walters' photo. Phiffer pointed out the truck which she said Walters was driving. Because of Walters' history of violence, Sherman radioed for assistance and a cruiser manned by two uniformed policemen was dispatched. Phiffer told the detectives that she was afraid of Walters and she remained crouched behind the seat of the police car so the driver of the truck could not see her. Therefore, when the arrest was made she was not in a position to get a good look at the driver. When the blue truck stopped because of road construction, Detective Sherman, with Henault and a uniformed officer as backups, arrested the driver at pistol point. Both Sherman and Henault testified that the man arrested looked like the photo of Walters, with which they were familiar.

The person arrested was not Walters, but Dale J. Gero of Dalton, Massachusetts. After ordering Gero out of the truck and patting him down, the officers removed his wallet and examined its contents. The wallet contained an Arizona driver's license showing Gero as a resident of Phoenix. There was additional identification giving several Phoenix addresses. Other identification showed Gero's residence as Dalton, Massachusetts. There was also a student identification photo of Gero from Berkshire Community College in Massachusetts. Gero's wallet also contained bank charge cards, a Massachusetts fishing license in his name, and photos of his daughter and wife. All the identification in the wallet was in the name of Dale J. Gero; there was nothing suggesting the names of Barrett or Walters.

Henault testified that the arrest warrant was shown to Gero at the time of his arrest. Gero denied that he saw it until sometime after he was booked at the police station.

As soon as the Phoenix connection was discovered by the arresting officers, handcuffs were put on Gero and he was put into the cruiser with the uniformed officers for transportation to the police station. It is clear that Detectives Henault and Sherman were confident that they had arrested the person responsible for the assault, chase and shooting on November 1. At the time of his arrest, Gero was wearing a long sleeve sweatshirt. No attempt was made then or subsequently to examine his forearms for scars.

Gero did, indeed, have a Phoenix connection; it led directly to its police department. He had been a Phoenix police officer from 1974 until he moved back to Massachusetts in the summer of 1979. He started as a uniformed officer on patrol car duty and then was put on plain clothes assignments involving surveillance and stakeouts of armed robbery suspects.

Gero did not tell the arresting officers of his Phoenix police career. On his way to the police station, he told the officers that they had "the wrong guy." When one of the officers asked Gero if he thought it was funny (the officer thought Gero was grinning), Gero replied, "You don't realize, some day you're going to find out."

Henault testified that, after Gero was advised of his rights, he asked him if he owned any handguns and Gero denied that he did. Gero testified that he was never asked this question.

After being booked, Gero called a lawyer, Gary Case, who came to the police station. Case first talked to Henault to find out the charges against Gero. He told Henault that he had represented Gero in the purchase of his home and that Gero had been a police officer. Henault allowed Case to look at the Walters file. When Case told Gero of the charges, the photograph, and the identification by Phiffer as J.D. Walters, Gero asked to have the arresting officers interview him or the woman identify him. Case conveyed this message to Henault and Sherman, who told him that there were other cases they were working on and further information could be obtained later. Henault and Sherman then left.

In fact, Henault and Sherman were on their way to the home of Gero's in-laws in Dalton where Gero was living at the time. They were accompanied by an officer of the Dalton Police Department who knew Gero's father-in-law. Gero's wife stated that there were no rifles in the house, but she did produce a .22 Derringer pistol that belonged to Gero. The detectives thought this significant because of the .22 caliber ammunition seized from Walters' van after the chase and shooting. The police also took note that there was a Great Dane at the house; a Great Dane had been found in the basement of a building in which Walters had lived for a time.

Gero was held overnight in jail and released the next day on a $17,500 real estate surety bond posted by his wife's parents.

Henault continued the investigation. Another photo lineup was made with pictures of both Gero and Walters in it. Henault had the bartenders from Danny's Bar, Dan Reidy and his brother, examine the array. Both picked Gero's photo as a picture of the person involved in the brawl with Cynthia Phiffer inside the bar and the assault outside it on November 1. A close friend of Walters, Jocko Sitzman, also identified Gero's photo as being that of Walters.

Henault then learned of a woman, Bonnie Brewer, who had lived with Walters for a time and knew him well. He located her and showed her the photo array; she was the first one to identify the real Eric Walters from his picture. Brewer agreed to come to the police station the next day and give a written statement. After Brewer failed to show up as agreed, Henault went to her home. She said that she wasn't positive about the photo and wanted to see the person face-to-face before making a statement. This was arranged and on November 19 Brewer met Gero. She immediately said that he was not Walters, that she was sure about it, and he didn't have to show her his forearms. Brewer was, of course, aware of the scars on Walters forearms. Gero's forearms were exposed anyway, revealing a complete lack of scars. All charges against Gero

were dropped. The real Walters was subsequently arrested in Phoenix, sent to Massachusetts, tried and convicted. He is now back in Walpole State Prison.

II. The Law

The district court instructed the jury that the arrest warrant was unconstitutional because it did not sufficiently describe the person to be arrested. For the reasons that follow, we think this was error.

The seminal case on the constitutionality of arrest warrants is *West* v. *Cabell*, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed. 643 (1894). In that case, a warrant was issued for the arrest of James West and a man named Vandy M. West was arrested pursuant to it. Vandy West had never been known as or called James. Suit was brought by Vandy West against the arresting officer. The defense was that the warrant was issued and intended for Vandy West. The court instructed the jury that if they believed the person arrested was the one intended, the defendants were not liable. The Court reversed. It noted that under the common law, "affirmed into the American constitutions," *id.* at 86, 14 S.Ct. at 754, "a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him." *Id.* at 85, 14 S.Ct. at 753. Here, the arrest warrant gave the real name and an alias, albeit in reverse order, of the person the police intended to arrest. Unlike *West*, where the right person was arrested under the wrong warrant, the wrong person was arrested in this case.

In *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Court held that the particularity requirement of the fourth amendment "applies both to arrest and search warrants." *Id.* at 481 n. 9, 83 S.Ct. at 414 n.9. The question is, how particular an arrest warrant must be.

Federal Rule of Criminal Procedure 4(c)(1) requires that an arrest warrant "shall contain the name of the defendant or, if

his name is unknown, any name or description by which he can be identified with reasonable certainty." The Third Circuit has held that an arrest warrant for "John Doe a/k/a Ed" did not meet the fourth amendment particularity requirement even though the agent who executed the warrant knew that the defendant was the target of the warrant. *United States* v. *Doe*, 703 F.2d 745 (3d Cir. 1983).

The Second Circuit has also held a "John Doe" warrant without a name or description invalid and beyond cure by extrinsic evidence. *United States* v. *Jarvis*, 560 F.2d 494, 497 (2d Cir. 1977). In *United States* v. *Mahoney*, 712 F.2d 956, 961-62 (5th Cir. 1983), the Fifth Circuit noted the opinions of the Third and Second Circuits but held that, even if a warrant for "JOHN DOE a/k/a DENNIS (LNU)" was invalid for lack of particularity, its "good faith exception" to the exclusionary rule applied.

The warrant here was not a "John Doe" warant. It contained the actual name of the person sought and an alias that he used. We do not think it significant that the alias was the first name used on the warrant instead of following the a/k/a. Walters had used the name Barrett when stopped by the police officer investigating the store robbery and it checked out by computer. The warrant contained the two names used by the person sought.

This case is different than *Powe* v. *City of Chicago*, 664 F.2d 639 (7th Cir. 1981), on which the plaintiff puts great store. *Powe* acknowledged the general rule that "[a]n arrest warrant that correctly names the person to be arrested generally satisfies the fourth amendment's particularity requirement, and no other description of the arrestee need be included in the warrant." *Id.* at 645. *See also Wanger* v. *Bonner*, 621 F.2d 675, 682 (5th Cir. 1980). In *Powe*, however, the court found that the authorities were not certain of the name of the arrestee. It held that where the authorities do not know or are uncertain of the name of the arrestee, then the name

used in the warrant is arbitrary and the warrant must "give some other description of the intended arrestee that is sufficient to identify him." *Id.* at 647. We need not decide, however, whether we agree with the *Powe* holding because it is the general rule that applies here. The police here were certain that the arrestee was named either Lee Barrett or Eric Walters. The name Barrett had been verified by computer, and the name Walters had been obtained from several reliable sources. This is significantly different than *Powe* where the name in the warrant proved not to be the real name of the suspect, 664 F.2d at 642 n. 2; here, Walters was the real name of the person sought.

We cannot accept plaintiff's contention that the addition of Gero's name to the three complaints after his arrest by Chief Pires showed that the police were uncertain at the time the warrant issued of the name and identity of the person named in it. All it shows is that Pires thought that Walters had another alias. Based on what the police knew about Walters, this was not an unreasonable assumption.

The decisive question is whether, if Walters had been arrested, he could have challenged the warrant for lack of particularity. We think it clear that he could not. We find that the warrant met the fourth amendment requirement of particularity.

Moreover, even if the warrant were invalid, it was not the cause of Gero's arrest. The arrest was precipitated by Phiffer's assertion that she had just seen Walters driving a blue pickup truck. This was not a situation like that in *Powe* v. *Chicago*, 664 F.2d 639, where the plaintiff was stopped for a traffic violation and then arrested because of an outstanding warrant. The police, here, had probable cause to arrest Walters without a warrant. Indeed, in the light of what the police knew about Walters, they would have been derelict in their duties if they had not immediately pursued the vehicle which Walters was supposedly driving. And when the truck was

stopped, Phiffer's identification was confirmed by the remarkable facial resemblance of Gero to the photo that the police had of Walters. That is one of the disadvantages, or perhaps advantages, depending on whose face is being identified, of wearing a full beard and mustache.

This clearly was a case of reasonable mistaken identity and the law does not afford the plaintiff any solace. In *Baker* v. *McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), McCollan was mistakenly arrested pursuant to a facially valid warrant. He brought a section 1983 claim for the intentional failure to investigate and determine that the wrong man was imprisoned. The Court stated:

> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most, if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested.

Id. at 145, 99 S.Ct. at 2695 (footnote omitted). *Hill* v. *California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971) involved a mistaken arrest based on probable cause. The question was whether the evidence seized could be used against the real defendant. The Court's answer is pertinent to this case:

> Here there was probable cause to arrest Hill and the police arrested Miller in Hill's apartment, reasonably believing him to be Hill. In these circumstances the police were entitled to do what the law would have allowed them to do if Miller had in fact been Hill, that is, to search incident to arrest and to seize evidence of the crime the police had probable cause to believe Hill had committed.

Id. at 804, 91 S.Ct. at 1111.

Baker and *Hill* have been construed, and rightly so, to mean that where there is a facially valid warrant or probable cause for arrest, and here there were both, the only question is

whether it was reasonable for the arresting officers to believe that the person arrested was the one sought. *United States* v. *Glover*, 725 F.2d 120, 122 (D.C. Cir. 1984); *United States* v. *McEachern*, 675 F.2d 618, 621 (4th Cir. 1982). Indeed, this result seems compelled by the Supreme Court's language in *Hill* and the reference to the Supreme Court of California's opinion: "[W]e find no reason to disturb . . . the conclusion that '[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.' " *Hill* v. *California*, 401 U.S. at 802, 91 S.Ct. at 1110.

The facts here establish compelling reasons for the police reasonably to believe at the time they arrested Gero that he was Walters, the person named in the warrant.

We rule as a matter of law that Gero's mistaken arrest did not violate his constitutional rights.

As a matter of law, therefore, Chief Pires was not liable on the constitutional claim. Nor could he have been found liable on the state law claims of assault or false imprisonment. The evidence does not admit of a finding of assault against the chief and since there was both a valid warrant and probable cause for the arrest, there was no legal basis for a finding of false imprisonment under state law.

The plaintiff's request for instructions, the instructions given and plaintiff's objections thereto, his brief and oral argument make it clear that Gero was not making a claim for illegal police conduct and procedure following his arraignment. Nor do we see how, on the evidence, he could have any basis for such a claim.

Since the case went to the jury against the City of Pittsfield only on the 42 U.S.C. § 1983 claim without objection by plaintiff, the verdict against it must be reversed.[1]

---

[1] We are not suggesting that a state claim for false imprisonment had been proven. Quite the contrary.

There is one other matter that requires comment. In granting judgment n.o.v. for Chief Pires, the district court ruled as follows:

> However, mere negligence on Chief Pires' part will not support § 1983 liability. *Leite* v. *City of Providence*, 463 F.Supp 585 (D.R.I. 1978). Rather, the plaintiff must show that Chief Pires' failure to act reflected "a reckless or callous indifference" to the plaintiff's constitutional rights. *Clark* v. *Taylor*, 710 F.2d 4, 9 (1st Cir. 1983). This court is of the opinion that no reasonable jury could have concluded, on the basis of Chief Pires' prearrest conduct, that Chief Pires' failure to prevent plaintiff's unconstitutional arrest reflected a callous indifference to plaintiff's constitutional rights. Therefore, a judgment n.o.v. for Chief Pires is appropriate.

Clark v. *Taylor*, 710 F.2d 4 (1st Cir. 1983), was a suit against a prison warden, state police officers and the doctor director of the state crime laboratory. The portion of our opinion quoted was directed only to the warden's liability:

> We add the important emphasis that a prison official like defendant Mullen cannot be liable under section 1983 for merely negligent failure to act, *see Procunier* v. *Navarette*, 434 U.S. 555, 556, 98 S.Ct. 855, 862, 55 L.Ed.2d 24 (1978). He can, however, be liable for a failure to act that reflects a reckless or callous indifference to the rights and safety of the prisoners in his charge. *See Smith* v. *Wade*, 461 U.S. 30, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983).

Id. at 9. We do not think that the standard of liability of a prison official can be applied writ large to other state officials. We need not decide at this time under what circumstances Chief Pires might have been found liable, but note that he was a police policy maker, supervisor, and participant in the events leading to Gero's arrest. As the Supreme Court has

noted, "the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush." *Baker* v. *McCollan*, 443 U.S. at 139, 99 S.Ct. at 2692.

The judgment n.o.v. in favor of Chief Pires is affirmed; the judgment against the City of Pittsfield is reversed. Costs awarded to Pires and the City of Pittsfield.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 83-1837.

DALE J. GERO,
PLAINTIFF, APPELLANT,

v.

RICHARD A. HENAULT, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT
ENTERED: JULY 27, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court notwithstanding the verdict in favor of Anthony Pires is affirmed. Costs to Pires.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

By RICHARD W. GORDON
Chief Deputy Clerk.

[cc: Messrs. Dibble and Rogers.]

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 83-1838.

DALE J. GERO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

RICHARD A. HENAULT, ET AL.,
DEFENDANTS, APPELLEES.

CITY OF PITTSFIELD,
DEFENDANT, APPELLANT.

JUDGMENT
ENTERED: JULY 27, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The verdict of the jury in favor of Dale J. Gero against the City of Pittsfield is set aside and the judgment against the City of Pittsfield is reversed. Costs to the City of Pittsfield.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

By RICHARD W. GORDON
Chief Deputy Clerk.

[cc: Messrs. Dibble, Rogers and Reilly.]

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 83-1837.

DALE J. GERO,
PLAINTIFF, APPELLANT,

v.

RICHARD A. HENAULT, ET AL.,
DEFENDANTS, APPELLEES.

No. 83-1838.

DALE J. GERO, ET AL.,
PLAINTIFFS, APPELLEES,

v.

RICHARD A. HENAULT, ET AL.,
DEFENDANTS, APPELLEES.

CITY OF PITTSFIELD,
DEFENDANT, APPELLANT.

Before
CAMPBELL, *Chief Judge*,
COFFIN, BOWNES and BREYER, *Circuit Judges*.

ORDER OF COURT
ENTERED: AUGUST 29, 1984

Upon consideration of Petition for Rehearing and Suggestion for Rehearing En Banc", which document was submitted to the members of the panel and to the judges of the Court who are in regular active Service; and

The judges of the panel having voted to deny the petition for rehearing, and the judges of the Court who are in regular active service having voted against rehearing en banc,

It is ordered that said application for hearing en banc is hereby denied.

By the Court:

FRANCIS P. SCIGLIANO, Clerk.

[cc: Messrs. Reilly, Dibble and Rogers.]

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 80-0293-F

DALE J. GERO AND DONNA M. GERO,
PLAINTIFFS,

v.

RICHARD A. HENAULT, EDWARD SHERMAN, CITY OF PITTSFIELD, AND ANTHONY PIRES,
DEFENDANTS.

MEMORANDUM AND ORDER
SEPTEMBER 27, 1983

FREEDMAN, D.J.

On August 26, 1983, a jury rendered a verdict for the plaintiff, Dale Gero, against the defendant City of Pittsfield for $50,000 and against the defendant Chief of Police Anthony Pires for $50,000. The defendants City of Pittsfield and Chief Pires have now moved for judgment n.o.v. and, in the alternative, for a new trial. Both defendants also move this Court to amend the judgment to reflect the fact that the jury's verdict is in the amount of $50,000, for which the defendants are jointly and severally liable. Because I have decided to deny both motions as to the City, and grant Chief Pires' motion for a judgment n.o.v., I do not reach the question of whether the judgment should be amended.

I. BACKGROUND

On November 13, 1979, Dale Gero was arrested pursuant to a warrant that called for the arrest of "Lee Barrett, a.k.a. Eric Walters," who was wanted for assault with intent to commit murder. This man was also known by the alias "J.D." Although the warrant contained no description of the individual to be arrested, the arresting officers, defendants Richard Henault and Edward Sherman, arrested the plaintiff because one Cynthia Phiffer, who had been assaulted by someone known as "J.D.," identified the plaintiff as the man who assaulted her. The plaintiff spent the night in jail and was arraigned the next day. Chief Pires amended the complaint against "Lee Barrett, a.k.a. Eric Walters" to include Mr. Gero's name. About a week later, the police arranged a show-up with the suspect's girlfriend, who immediately identified the plaintiff as not being Eric Walters and the charges against the plaintiff were dismissed.

Plaintiff sued the arresting officers, Chief Pires, and the City of Springfield under 42 U.S.C. § 1983 on the theory that his arrest—pursuant to an invalid warrant and without probable cause—deprived him of the due process of law guaranteed him by the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiff also had state claims of assault and false imprisonment. Mrs. Gero sued the defendant police officers for intentional infliction of emotional distress and loss of consortium.

In connection with the § 1983 claim against the defendant officers, this Court instructed the jury that the warrant defendants used to arrest the plaintiff was unconstitutional as a matter of law because it did not sufficiently describe the person to be arrested. The jury was also instructed that it is lawful for police officers to arrest someone if they have probable cause to believe that person has committed a felony. Finally, this Court instructed the jury on the defendant police officers' good faith defense that is available to them in § 1983 actions even though the defendants may have acted in an unconstitutional manner.

On the issue of the City's liability in § 1983 actions, this Court instructed as follows:

> A governmental body such as the City of Pittsfield can be found to be responsible for the violations of a person's rights under § 1983 of Title 42 of the United States Code.
>
> The City of Pittsfield is the employer of police officers. But the City cannot be held liable merely because the police officers involved are its employees. An incident of unlawful arrest on the part of the police officers, standing by itself, is insufficient to find the City of Pittsfield liable under § 1983.
>
> A governmental body can be found responsible for the deprivation of a person's civil rights if the actions taken by its employees are in accordance with a custom or practice of the government and those actions caused the deprivation of the person's rights. The custom or practice may be an official policy of the City, but the custom or practice does not have to be authorized by written law nor must it be the result of formal approval through official decision-making channels. It is enough that the customs or practices are so permanent and well-established as to demonstrate implicit authorization or approval or acquiescence in the unconstitutional conduct. Where a city's failure to train, supervise, or discipline police officers is reckless or grossly negligent and this failure constitutes a custom or practice of the city, the city may be held liable under § 1983.
>
> There is no defense of good faith for the City of Pittsfield. If you find that the City's official or unofficial policies with respect to the arrest of individuals or with respect to the City's reckless failure to train, supervise or discipline its police officers caused the plaintiff's injuries, it is not a defense that the policy was adopted in good faith.

As to the Chief's liability, the jury was directed:

> An individual in a supervisory capacity may be liable under § 1983 if that individual has a duty to act to prevent the deprivation of the plaintiff's constitutional rights. However, such individual may be liable only if his failure to act to prevent the plaintiff's constitutional deprivation reflects a reckless or callous indifference to the plaintiff's constitutional rights. A supervisor cannot be found liable merely for failing to adopt policies to prevent constitutional violations. If you find that plaintiff suffered deprivations of his constitutional rights and that defendant Pires had a duty to act to prevent those deprivations and that defendant Pires recklessly or callously failed to prevent those deprivations, then you may find defendant Pires liable under § 1983 for plaintiff's constitutional deprivations.

The jury returned a verdict in favor of all four defendants against the plaintiff Donna Gero, and in favor of the defendant police officers against the plaintiff Dale Gero. However, the jury found against the defendants City and Chief Pires in favor of Dale Gero rendering a verdict of $50,000 against each defendant.

II. MOTIONS FOR JUDGMENT N.O.V. AND NEW TRIAL

Both the City and Chief Pires move for judgment n.o.v. and, in the alternative, for a new trial. A judgment n.o.v. is proper "only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice ¶ 50.07[2], at 50-77; *Rios* v. *Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978). The court must view the evidence in the light most favorable to the moving party, giving him the benefit of every possible favorable inference. *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 885 (1st Cir. 1978).

In deciding whether to grant a new trial, the trial judge "should not interfere with the verdict 'unless it is quite clear that the jury has reached a seriously erroneous result.' " *Coffran* v. *Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir. 1982), (*quoting* 6A Moore's Federal Practice ¶ 59.08[5], at 59-160), *cert. denied*, 103 S.Ct. 571 (1982). "The district court should order a new trial only when convinced that a miscarriage of justice would otherwise obtain." *Rios*, *supra* at 990.

The City's argument for judgment n.o.v. is that no reasonable jury could have found that Officers Henault and Sherman did *not* have probable cause to arrest Dale Gero for a felony. Therefore, there was no constitutional violation and no § 1983 liability. I do not think the evidence is so overwhelming as to require a finding of probable cause. Rather, the plaintiff made a persuasive case for a finding that the officers picked up Dale Gero mainly because of the identification of Cynthia Phiffer, who was only a misdemeanor victim. Particularly when one views the evidence in the light most favorable to the plaintiff, it is hard to say that the only reasonable conclusion the jury could have reached is that the officers had probable cause to arrest Dale Gero for a felony. Thus, a judgment n.o.v. for the City of this ground is inappropriate.

Nor does it seem that, as to the City, a new trial is necessary. There was evidence that it was the City's routine policy to issue alias warrants without descriptions. This Court ruled that such warrants are constitutionally invalid as a matter of law. The City has no good faith defense. Therefore, it does not seem to be "seriously erroneous" or "a miscarriage of justice" that the jury found the City liable under these circumstances.

The Court notes that the situation as to Chief Pires is different, however. As mentioned earlier, the plaintiff's theory on his § 1983 claim was that his arrest was unconstitutional; plaintiff did not argue an on-going due process violation stemming from his continued wrongful incarceration. The evi-

dence showed that Chief Pires' involvement with plaintiff's arrest and incarceration occurred mainly after plaintiff was arrested, e.g., the evidence showed that Chief Pires added the plaintiff's name to the complaint. The evidence of Chief Pires' pre-arrest involvement, however, is minimal. Chief Pires was aware of the department's policy of issuing alias warrants without descriptions. However, a supervisor in the Chief's position cannot be held liable for failing to adopt policies that will protect constitutional rights. *Wanger* v. *Bonner*, 621 F.2d 675, 680-81 (5th Cir. 1980); *Kostka* v. *Hogg*, 560 F.2d 37, 40 (1st Cir. 1977). Chief Pires also reviewed the reports and documents compiled during the investigation of Eric Walters, and had on-going discussions with his detectives concerning the investigation. However, mere negligence on Chief Pires' part will not support § 1983 liability. *Leite* v. *City of Providence*, 463 F.Supp. 585 (D. R.I. 1978). Rather, the plaintiff must show that Chief Pires' failure to act reflected "a reckless or callous indifference" to the plaintiff's constitutional rights. *Clark* v. *Taylor*, 710 F.2d 4, 9 (1st Cir. 1983). This Court is of the opinion that no reasonable jury could have concluded, on the basis of Chief Pires' pre-arrest conduct, that Chief Pires' failure to prevent plaintiff's unconstitutional arrest reflected a callous indifference to plaintiff's constitutional rights. Therefore, a judgment n.o.v. for Chief Pires is appropriate.

Accordingly, the defendant City of Pittsfield's motions for judgment n.o.v. and a new trial must be, and hereby are, DENIED, and the defendant Chief Pires' motion for judgment n.o.v. must be, and hereby is, GRANTED.

It is So Ordered.

FRANK H. FREEDMAN
United States District Judge

APPENDIX F

PLAINTIFF'S EXHIBIT NO. 21

No. 8353

COMMONWEALTH

vs.

LEE BARRETT AKA ERICK WALTERS

WARRANT
AND
SUBPOENA

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

To any Officer authorized to serve criminal process in said Commonwealth, and to the Sheriff of our said county of Berkshire, or either of his Deputies, or Massachusetts State Police Officer, or either of the Constables or Police Officer of any town or city within said County, for the transaction of criminal business:

GREETING:

WE COMMAND you, and each of you, upon sight hereof, to take and bring before the District Court of Central Berkshire, holden at the City of Pittsfield, for the transaction of criminal business, within the County of Berkshire, the body of

LEE BARRETT AKA ERICK WALTERS

of said city of Pittsfield, if he be found in your precinct, to answer to the Commonwealth on complaint of Detective Richard Henault of said City of Pittsfield, this day made on oath before said Court, for

Ch 265 Sec. 15 — ASSAULT WITH INTENT TO MURDER
(Three Counts)

at said City of Pittsfield, and within the judicial district of said Court, against the peace of said Commonwealth and the form of the statute in such case made and provided.

AND WE ALSO COMMAND you, and each of you, in the name of said COMMONWEALTH OF MASSACHUSETTS, to summon the complainant aforesaid, and to appear forthwith before the District Court of Central Berkshire, holden at said City of Pittsfield, for the transaction of criminal business, within the County of Berkshire, to give evidence on behalf of said Commonwealth of what they know relative to said complaint.

Hereof fail not, and make return of this precept, with your doings thereon.

WITNESS, FRANK W. CIMINI, Esquire, at the City of Pittsfield, aforesaid, this third day of November in the year of our Lord one thousand nine hundred and seventy Nine.

(s) Joseph N. Barnini
Clerk of said Court

CITY OF PITTSFIELD,

BERKSHIRE, ss. 197

I have arrested the within named defendant Lee Barrett AKA Erick Walters and have him in Court,

DETS. HENAULT & SHERMAN, *Police Officer*

and I have also this day summoned the within named witnesses, to appear as within directed.

..... *Police Officer*

APPENDIX G

PLAINTIFF'S EXHIBIT NO. 8

Copy in A&B File

PITTSFIELD POLICE DEPARTMENT
Investigating Officer's Report
ASSAULT AND BATTERY - 2-cts

DAY	DATE	TIME REPORTED
Tuesday	Oct. 16, 1979	01:15 A.M.

DEFENDANT	ADDRESS	AGE	SEX
J.D. (ERIC) WALTERS, drive a 1967 Yellow Van, Arizona plates 6'2", 200 lbs., shoulder length blond hair, possible beard and moustache, scars on left forearm.		30's	Male

VICTIM	ADDRESS	AGE	SEX
1. Cynthia A. Phiffer	8 Dalton Ave., Pittsfield	20	Female
2. Iva Ann Critilli	8 Dalton Ave., Pittsfield	18	Female

WHERE ASSAULT TOOK PLACE
Corner of Curtis and Fourth St. on sidewalk in front of Danny's Bar

NATURE OF ASSAULT
grabbed arm, pulled hair, punched in face

NATURE AND EXTENT OF INJURIES
Cynthia — bruised jaw, left front tooth knocked out, cut tongue, lips and gums
Iva Ann — bruised right upper arm

ATTENDED BY	HOSPITALIZED	
B.M.C. E.R. looked at it — referred to Dentist	Yes ☐	No ☒

ARE DEFENDANT AND VICTIM RELATED
No

FULL DETAILS

Two warlock girls started a fight with me and my sister. Everything settled down when this person known as D.J. came over and grabbed Iva Ann by the arm and was going to punch her. D.J started calling me a "niger lover" and then punched me in the jaw and pulled my hair. The fight was broken up and another one started between two males. At this time J.D. (Illegible) punched me in the mouth, knocking my tooth out. He started running towards his van and turned around pulled out a knife and said you're dead. He then left in the Van.

CLARK E. FEN, JR., *Officer*

Copy for Clerk of Courts
Lic. Board

APPENDIX H

PLAINTIFF'S EXHIBIT NO. 7

Where Taken	By Whom	Date & Time Taken
Pittsfield Police Dept.	Det. Collias	10-16-79 2:30 P.M.

I, Cynthia A. Phiffer am 20 years of age, born on 11-14-58 my address is 8 Dalton Ave. my tel. no. none my occupation is Unemployed and degree of education is 9th

I make the following statement freely and voluntarily to Det. Collias of the Pittsfield Police Department after having been told that I do not have to make any statement and that anything I say may be used against me.

On Monday night, Ann Critilli and I were in Danny's bar on Fourth St. Every thing was fine until some of the girls from the warlocks came into the bar and started some trouble with us. She said that we started trouble with one of thier daughters and that we were in trouble for that. She said that I wanted to kick her ass, but that was not true. I just wanted to talk to her about why she went to the landlord and got us evicted. After a while, every thing calm down. Soon, this guy D.J. was talking to these girls and that he had gone over to us and started to fight with us. He grabbed Ann by the left arm and I told D.J. to stop. He also had hit her. Then he started to fight with me. He sucker punched me in the jaw and in the nose and I tried to defend my self. Some guys broke up the fight and he went out side.

Later there was a fight inside the bar and two guys were fighting on the floor. That is when he came up from behind me and punched me in the mouth. He knocked

out a tooth. Prior to this, he was comming in and out of the bar cussing me and swearing. I was sitting on the bar stool when he hit me in the mouth. I think that he had a knife in his hand because it was very hard when he struck me. Also as he left the bar, Petro, the bar tender, saw him open a knife and he waited for me to come out of the bar but all the guys inside stopped me. After that he left in his dark yellow van. Older van, but I don't know the make. N.Y. plates on the Van.

I know him from before. I have met him at Danny's. He seemed to be alright then. He said that he had just got out of Walpole and that he robbed banks. He showed us two guns that he kept in a rolled up sleeping bag and he mentiond something about a rifle but we did not see it. One of the guns was a snub nose 38 and the other was a Bull dog 38. He also said that he was going to do a bank job and that he wanted us to help us. He showed us his arms that was all scarred up from cuts that he said that he did while he was in prison. His name if D.J. but his real first name is Jeff I want to say that his name is J.D. not D.J.

Signature (s) *Cynthia A. Phiffer*

Time 3:00
Witnessed by: Det. Collias

Copy to be sent to Lic. Board

APPENDIX J

PLAINTIFF'S EXHIBIT NO. 32

M.MA0022200.AZ0372300.TXT
FROM PD PITTSFIELD MA TO PHONEX AZ PD
WONTED INFO ON LIST OF NAMES ALL ONE PERSON
WONTED FOR INVESTIGATION OF SHOOTING
JOHN CHARLES LAWRENCE
LEE BARRETT
JERRY DEAN MCMURRAY
JERRY WALTER HIEL
RAYMOND ROEL PALMER
JOHN DEAN WALTERS
OR J.D. WALTERS
DOB 02-01-48
THE ABOVE ARE ALL THE SAME MAN
DET HEANAULT MJD 11-12-79

NLETS 744 29 11/12/79 0832 EST PIT/0222.
MESSAGE NUMBER 744 INTERCEPTED FOR REVIEW

NLETS 758 30 11/12/79 0834 EST PIT/0222.
MESSAGE NUMBER 744 FORWARDED TO NLETS

APPENDIX K

PLAINTIFF'S EXHIBIT NO. 36

AM.MA0022200.AZCISPX00.TXT
PD PITTSFIELD MASS FILE 25 11/13/79
TO ARIZONA DEPT OF PUBLIC SAFETY

REQUEST FOR RE BROADCAST THROUGHOUT STATE

UNDER ARREST THIS DEPT DALE J. GERO, DOB 11/16/50, SSN 027300003 W M, 511, 165 LBS., BRO HAIR, HAZEL EYES, FULL BEARD.

SUBJECT AKA JOHN CHARLES LAWRENCE, LEE BARRETT, JERRY DEAN MCMURROY, JERRY WALTER HIELAMAN, RAYMOND ROEL PALMER, JOHN DEAN WALTERS, J D WALTERS, ERIC.

VEHICLE SUBJECT HAD BEEN DRIVEING 69 FORD VAN YELLOW AZ REG 2BJ279. REG TO SHERRY PALMER 305 E PIERCE ST., PHOENIX.

SUBJECT FORMER POLICE OFFICER PHOENIX. INFO RECEIVED SUBJECT WANTED IN AZ FOR ATTEMPTED MURDER OR ARMED ASSAULT.

PITTSFIELD PD 413 443 3511.
AUTH SGT LEE OP BENOIT

A NLETS 4889 33 11/13/79 1907 EST PIT/0222.
MESSAGE NUMBER 4889 INTERCEPTED FOR REVIEW

APPENDIX L

EXCERPTS OF TRIAL TESTIMONY

Gero v. *Henault*, August 18, 1983 (D. Mass. 1983)

Testimony of Dale Gero, Tr. at 42-44.

* * *

[42] Q. What happened in the booking procedure or what [43] happened to you in the booking procedure, can you tell the Court and jury what things physically takes place, what transpires?... A. After being advised of my rights and the charges, like I told you, they took me into another room where they took all my property out of my pockets, took my jacket, I think I had a sweatshirt on, and a group of officers were standing around me and they were all going through my identification and counting my money on the desk.

One of the officer took my identifications and laid them down, one at a time — Dale Gero, Dale Gero, Dale Gero. He said, "I guess that is your real name, huh?" I said yes, it is.

Detective Henault came by and said — one of the officers said to Detective Henault, he said, [44] this guy's got a lot of names of Gero, and he said well, that doesn't mean anything, when you have as many aliases as he does.

* * *

Testimony of Cynthia Phiffer, Tr. at 386-87, 390-91.

* * *

[386] Q. What did you do when you saw the truck? A. I told the Detectives, I says, I don't want him to see it's me because I don't want him shooting at me or anything, you know.

Q. Where were you in the police vehicle? A. In the back seat.

Q. So what did you do? A. I got under on the floor in the back seat.

Q. Did the police car — were you aware that the police car had stopped? A. Yes.

Q. And were you aware that the officers got out of the car? A. Yes.

[387] Q. And did you see them get out of the car? A. Yes.

Q. Did you see what they did after that? A. Well, I did pop my head up one time and I seen him, the Detectives at the truck, one on one side and one on the other side.

Q. And what did you see? A. I seen Detective Sherman holding his gun at the guy and that is it. I ducked back down, that is all I seen.

Q. Did you ever get a good look at the man that they were arresting? A. No.

Q. Did you see the man against the truck like this? A. I told you, I didn't stay my head up that far. I just kept down after I seen the gun and everything.

Q. So you didn't seen anything much of what happened at that arrest? A. No, no...

* * *

[390] Q. What was your state of mind at the time?

By that, I mean fear, excitement or that sort of thing — what was it?

A. Fear.

[391] Q. Fear? A. Yes.

Q. Did you ever get a good look at Dale Gero, the man they arrested? A. No.

Q. Did they let you see him at the Police Station when you were back there signing the statement? A. No.

Q. Mr. Gero, would you stand up, please.

If you had gotten a good look at Dale Gero, would you have known that he was not Eric Walters? A. Well, he does resemble him a little bit, but I would have recognized that it wasn't him.

* * *

Testimony of Anthony Pires, Tr. at 501-03, 512, 612-13.

* * *

[501] Q. What was the policy and procedure of the Pittsfield Police Department in November of 1979 when there was uncertainty about the name of a [502] suspect, uncertainty about his name and the knowledge that he used various aliases? A. In this particular case it was whatever those three gentlemen, the victims stated to the police, the facts and the Detectives' investigation came up with two or three names and those were the names that we used.

Q. What was your policy and procedure in November, 1979, in the Pittsfield Police Department as to what you did when you weren't sure what the name was of the person that you wanted to arrest? A. If we had no name, then we would give the best description possible.

Q. What if you had aliases, did you put a description on the warrant? A. If the aliases were involved in a particular offense we were arresting him for or charging him for, yes.

Q. If you knew there were aliases, you put a description on the warrant? [503] A. I don't understand that, sir?

Q. If you knew the suspect used aliases, did you put a description of the suspect on the warrant? A. No, sir, we put aliases.

Q. But no description? A. No, sir.

Q. That was your policy and procedure? A. That is the way we interpret the law, yes, sir.

Q. That is the way you interpreted the law? A. Yes.

Q. Five aliases, you put the five aliases, but no description? A. If this was the particular name involved in that particular offense, yes, sir.

Q. If you knew 45 aliases, you put the 45 aliases and no description? A. If that was involved in that particular offense, yes.

Q. That was your custom and practice in November of 1979? A. Yes, sir...

* * *

[512] Q. Does he know — well, did the assault and battery report, Plaintiff's Exhibit #8, contain a name of the prospective defendant? A. It has a name here, sir, yes, sir.

Q. What is the name? A. J.D., and then in parentheses Eric, and then the name of Walters is written alongside that.

Q. Do you recall whether the name Walters, the written portion of that exhibit, was contained on Plaintiff's Exhibit 8 when you first saw it on or about October 17th? A. I believe it was, sir.

Q. It was written on there, Walters? A. I believe, sir, yes...

* * *

[612] Q. Now, Captain Pires, were you in the Police Station on November 13th, 1979, a day when all these exhibits we just went through were in your files as to what the description of this person was, what his name was, what his address was when one Cynthia Phiffer came into the station with a report of something?... A. I was in the building at the time, sir, yes, sir.

Q. Did you personally see Cynthia Phiffer? A. I don't recall, I certainly heard her, but I don't recall seeing her.

Q. When you say you heard her, do you recall what — [613] what do you mean by that? A. That I heard what she was yelling out to the Detectives.

Q. What was she yelling out? A. She said I just saw J.D., he drove by the Station in a blue pickup. He looked right at me. He turned down Fenn Street, heading toward First.

Q. She said "I just saw J.D.," that is what she said? A. That is the best of my recollection, yes, sir.

* * *

Testimony of Edward Sherman, Tr. at 842-43.

* * *

[842] Q. What did you say as you walked up to the vehicle? A. When I got up to the vehicle I told him to get out of the truck, sir.

Q. And you assisted — Detective Sherman, you assisted Detective Henault in arresting Mr. Gero? A. Yes, I did, sir.

Q. You made that arrest pursuant to a warrant which Detective Henault had brought with him, is that right? A. Partially, sir, yes.

[843] Q. Partially pursuant to a warrant? A. Partially from the probable cause, we had to assume that Mr. Gero was, in fact, the gentleman named in the warrant.

Q. You made the arrest pursuant to a warrant? A. Pursuant to a warrant, sir.

* * *

APPENDIX M

EXCERPTS FROM DEPOSITION OF RICHARD A. HENAULT

Gero v. *Henault*, April 21, 1982

Testimony of Richard A. Henault at 27.

Q. It's accurate; is it not, that some arrests are made by means of a warrant? A. That's correct.

Q. And other arrests are made without a warrant? A. That's correct.

Q. The arrest of Dale Gero, was that made on the basis of the warrant or not on the basis of the warrant? A. On the basis of the warrant.

Q. It was made on the basis of the warrant? A. Yes.

* * *

Supreme Court, U.S.
FILED
DEC 27 1984
ALEXANDER L. STEVAS
CLERK

No. 84-865 (2)

In The

Supreme Court of the United States

October Term, 1984

DALE J. GERO,

Plaintiff-Petitioner,

vs.

ANTHONY J. PIRES and CITY OF PITTSFIELD,

Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether an arrest warrant which contains the name of the intended arrestee and an alias but no physical description is constitutionally defective and creates in a mistaken arrestee a right to damages under 42 U.S.C. §1983 even if there were probable cause, apart from the warrant, to arrest the mistaken arrestee?

2. Whether the decision below or the record raises the Question Presented in the Petition "Should Baker v. McCollan, which holds that there is no constitutional violation where an innocent person mistakenly named in a warrant is arrested, be extended to a situation where an innocent person not named in the warrant is arrested?"?

3. Whether a different Fourth Amendment standard applies in money damage claims under 42 U.S.C. §1983 than applies in the criminal context?

4. Whether, on the evidence in this case, there was, as a matter of law probable cause to arrest the intended arrestee and a reasonably mistaken belief on the part of the arresting officers that the mistaken arrestee was the intended arrestee?

5. Whether, on the evidence in this case, supervisory personnel or the municipal employer could be liable for money damages under 42 U.S.C. §1983 on the basis of the arresting officers' error in taking the mistaken arrestee into custody?

TABLE OF CONTENTS

Pages

Counterstatement of Questions Presented for Review i

Table of Authorities iii

Counterstatement of the Case 1

Reasons Why A Writ Should Not Be Granted:

1. An Arrest Warrant Which Contains the Names of the Intended Arrestee and an Alias But No Physical Description is Not Constitutionally Defective And, In Any Event, Creates No Right to Damages Under 42 U.S.C. §1983 If There is Probable Cause to Arrest Apart From the Warrant. 4

2. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition: "Should Baker v. McCollan, which holds that there is no constitutional violation where an innocent person mistakenly named in a warrant is arrested, be extended to a situation where an innocent person not named in the warrant is arrested?" 5

3. The Same Fourth Amendment Standard Applies to Money Damage Claims Under §1983 As Applies In the Criminal Context. 6

4. On the Evidence In This Case, There Was, As a Matter of Law, Probable Cause to Arrest Eric Walters And A Reasonably Mistaken Belief On the Part of the Arresting Officers That the Petitioner Was Eric Walters. 7

5. On the Facts Of This Case, Neither Supervisory Personnel Nor the Municipal Employer Could Be Liable On the Basis of Arresting Officers' Mistaken Belief That Petitioner Was Walters. 9

TABLE OF CONTENTS—Continued

Pages

Conclusion 10

Appendix A ..... App. 1

Appendix B ..... App. 2

Appendix C ..... App. 3

Appendix D ..... App. 5

Appendix E ..... App. 8

TABLE OF AUTHORITIES

CASES

Baker v. McCollan, 443 U.S. 137 (1979) ..... i, 5, 6

Ferganchick v. United States, 374 F. 2d 559 (9th Cir. 1967) 5

Hill v. California, 401 U.S. 797 (1971) 6, 8, 9

Illinois v. Gates, 462 U.S. 213, *reh. den* — U.S. —, 104 S. Ct. 33 (1983) 6

Powe v. City of Chicago, 664 F. 2d 639 (7th Cir. 1981) 5

United States v. Leon, — U.S. —, 104 S. Ct. 3405 (1984) 6

United States v. Watson, 423 U.S. 411 (1976) 5

West v. Cabell, 153 U.S. 78 (1894) 4, 5

Wong Sun v. United States, 371 U.S. 471 (1963) 4

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amend. IV ..... i, 4, 5, 6, 7

42 U.S.C. § 1983 ..... i, 5, 6, 7

Fed. R. Crim. P. 4 4

No. 84-865

In The

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DALE J. GERO,

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ANTHONY J. PIRES and CITY OF PITTSFIELD,

Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Respondents Anthony J. Pires and City of Pittsfield respectfully request that this Court deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. The opinion is reported at 740 F. 2d 78 (1st Cir. 1984).

COUNTERSTATEMENT OF THE CASE

The facts of the case as set forth in the Petitioner's Statement of the Case are erroneous and misleadingly

sparse. The statement of facts contained in the opinion of the First Circuit at 740 F. 2d 78, at pp. 80-83 and included in Petitioner's Appendix A, pp. A-3 through A-9, is far more complete and accurate. The Respondents refer the Court to the First Circuit's recitation of the facts of this case and supplement those facts only to the following extent.

By November 13, 1979, the Pittsfield, Massachusetts, police were seeking an Eric Walters a/k/a Lee Barrett on three warrants for assault with intent to murder Gene Sayers, David Sinopoli and William DeCelles on November 1, 1979, near Danny's Bar in Pittsfield. By November 13, 1979, the Pittsfield police also had information that the suspect in the Sayers/Sinopoli/DeCelles incident was the same individual who had, the month before, beaten a young woman at Danny's Bar. (Respondents' Appendix A). On October 16, 1979, a Cynthia Phiffer had complained to police that she had had a tooth knocked out at Danny's Bar by a man known to her as "J.D." or "Eric" and, on October 22, had called the police to further identify her assailant as "Eric Walters." (Petitioner's Appendix G, Respondents' Appendix B) Therefore, contrary to Petitioner's claim (Petition, p. 4), when Ms. Phiffer ran into the Pittsfield police station on November 13 to report that she had just seen "J.D."—"Eric Walters" in front of the station house, the Pittsfield police, if not the actual arresting officers, did have substantial information that the Sayers/Sinopoli/DeCelles assailant was the same person as the Phiffer assailant.

Although at the 1983 trial, Ms. Phiffer was tentative in her identification of the Petitioner Dale Gero, she was

absolutely unequivocal on the day of his arrest in November, 1979. (Respondents' Appendix C)

Petitioner stresses the disparity between his own features on the day of his arrest and some of the descriptions in some of the witness statements obtained by the police as of November 13. (Petition, p. 5). The police had descriptions of Walters ranging from a height of 5'11" to 6'2", a weight of 185 pounds to 220 pounds, and a beard and hair color of "blond" to "blondish brown" to "blond, red, brown" to "brown frizzly" (Respondents' Appendix D). At the time of his arrest, Petitioner was 5'11", 165 pounds and had brown hair and beard. Much more significantly, Petitioner had a remarkable facial resemblance (Respondents Appendix E, Photograph 10) to Walters, the intended arrestee (Respondent Appendix E, Photograph 3).[1]

Both Petitioner and Walters had a substantial connection with Phoenix, Arizona as indicated in the First Circuit's statement of the facts of this case (Petitioner's Appendix A, pp. A-4 through A-9).

The jury below found for the arresting officers on all claims, including state law claims that the officers arrested Petitioner without probable cause.

———o———

[1]Even at trial of this matter, when he had every reason to articulate every difference between the Walters' photograph and himself, Petitioner identified only the following differences: the shape of the hairline, the shape of the beard, V-shaped scar on forehead of Walters and darkened front tooth. (Respondents' Appendix D)

REASONS WHY A WRIT SHOULD NOT BE GRANTED

1. An Arrest Warrant Which Contains the Name of the Intended Arrestee and an Alias But No Physical Description is Not Constitutionally Defective And, In Any Event, Creates No Right to Damages Under 42 U S.C. §1983 If There Is Probable Cause to Arrest Apart From the Warrant.

Although not in itself governing of the state arrest warrant at issue in this case, Federal Rule of Criminal Procedure 4 provides guidance as to the degree of particularity required of arrest warrants in order to satisfy the Fourth Amendment, "from which the requirements of the Rules derive." *Wong Sun v. United States,* 371 U.S. 471, 481 n. 9 (1963). The Rule requires that an arrest warrant "shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty." Fed. R. Crim. P. 4 (c)(1).

The warrant in this case contained the name of the intended defendant—Eric Walters—and a further name—Lee Barrett—which appeared on the Phoenix, Arizona identification he produced when stopped on an unrelated matter by Pittsfield police on November 2, 1979 (Petitioner's Appendix A, p. A-5). The warrant thus met the standard articulated in *West v. Cabell,* 153 U.S. 78 (1894), in that it did "truly name" Walters, the intended arrestee. The warrant provided additional identifying information in the form of his alias. Although it may well have been possible, or even prudent, for the Pittsfield police to have included on the Walters' warrant every descriptive detail known to them, the Fourth Amendment does not require such Proustian particularity. Moreover,

the police had a photograph of Walters and, although it was not physically attached to the warrant, the arresting officers were fully familiar with it. (Petitioner's Appendix A, p. A-6) The Petitioner was accidentally arrested because of his physical similarity to the intended arrestee and not because his name was the same as the intended arrestee, as may have been the case in *Powe v. City of Chicago*, 664 F. 2d 639 (7th Cir. 1981), or similar to the name listed on the warrant as in *West v. Cabell,* 153 U.S. 78 (1894).

Even if the Walters' warrant were facially invalid, the arrest itself would not, thereby, be rendered unlawful but instead must be scrutinized under *United States v. Watson,* 423 U.S. 411 (1976), as a warrantless, daytime felony arrest occurring in a public place. *Ferganchick v. United States,* 374 F. 2d 559 (9th Cir. 1967). If there were probbale cause to arrest the Petitioner without the warrant, then any defects in the warrant are immaterial for Fourth Amendment purposes and, necessarily, for 42 U.S.C. § 1983 purposes.

2. Neither the Decision Below Nor the Record Raises the Question Presented in the Petition: "Should Baker v. McCollan, which holds that there is no constitutional violation where an innocent person mistakenly named in a warrant is arrested, be extended to a situation where an innocent person not named in the warrant is arrested?"

The Petitioner suggests that the First Circuit has extended the holding of *Baker v. McCollan,* 443 U.S. 137 (1979) to situations in which any individual not named in an arrest warrant is arrested pursuant to that warrant. The Petitioner misreads the First Circuit's opinion.

The First Circuit concluded that because the Walters' warrant was facially valid or, in the alternative, because the Pittsfield police had probable cause to make a warrantless felony arrest of Walters, the only issue was whether, as a matter of law, the arresting officers were reasonably mistaken in believing that the Petitioner was Walters. If the arresting officers were reasonably mistaken in their belief that the Petitioner was Walters, then the Petitioner's arrest was valid under *Hill v. California*, 401 U.S. 797 (1971).

Baker v. McCollan, 443 U.S. 137 (1979) is significant to this case primarily for the axiom that "[t]he Constitution does not guarantee that only the guilty will be arrested." Nothing in the First Circuit's opinion or in the record suggests that that axiom was extended by either the District Court or the First Circuit.

3. The Same Fourth Amendment Standard Applies to Money Damage Claims Under §1983 As Applies in the Criminal Context.

In assailing the First Circuit for concluding that "[t]he decisive question is whether, if Walters had been arrested, he could have challenged the warrant," the Petitioner argues that a different and more stringent Fourth Amendment governs civil damage claims under § 1983 than controls cases in the criminal context.

The Petitioner asserts that *United States v. Leon*, 104 S. Ct. 3405 (1984) and *Illinois v. Gates*, 103 S. Ct. 2317 (1983), by altering the exclusionary rule sanction for Fourth Amendment violations in the criminal law setting, have also reduced the evidentiary threshhold necessary for recovery of damages pursuant to 42 U.S.C. § 1983. Whatever merit there may be in the Petitioner's

claim that § 1983 damage awards should be encouraged by this Court, the statute nevertheless requires a "deprivation of . . . rights, privileges or immunities secured by the Constitution and laws" before liability may attach. The "deprivation" alleged in this case is the claimed deprivation of the Petitioner's right to be secure against unreasonable searches and seizures, as provided in the Fourth Amendment. A vast body of law, primarily in the criminal context, defines the contours of the Fourth Amendment right which is the same right whether the claimant is a presumptively innocent criminal defendant or a purportedly innocent civil plaintiff. Contrary to the Petitioner's assertion, there is no "essential distinction between the [Fourth Amendment] rights of the actual suspect raised in a criminal context, [and] the [Fourth Amendment] rights of an innocent person arrested on a warrant naming someone else raised in a civil context." (Petition, p. 10)

4. On the Evidence In This Case, There Was, As A Matter of Law, Probable Cause to Arrest Eric Walters And A Reasonably Mistaken Belief On the Part of the Arresting Officers That the Petitioner Was Eric Walters.

The First Circuit properly concluded that the arrest of the Petitioner was constitutionally valid. The Petitioner has never seriously disputed that there was probable cause to arrest Eric Walters for the assault with intent to murder Sayers, Sinopoli and DeCelles. Accordingly, Petitioner's argument about the invalidity of the warrant is largely academic.

The ultimate issue is whether the arresting officers, as a matter of law, reasonably mistook the petitioner for Eric Walters, because " '[w]hen the police have probable

cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.'" *Hill v. California*, 401 U.S. 797, 802 (1971). The jury found for the arresting officers on all counts, including the state law claims that the petitioner was arrested and held without probable cause.

By means of radical editorial surgery, the Petitioner has the First Circuit concluding that " 'the cause of Mr. Gero's arrest . . . was Phiffer's assertion that she had just seen Walters driving a blue pickup truck.' " (Petition, p. 16) The Court of Appeals said no such thing. The First Circuit actually said,

> " . . . even if the warrant were invalid, it was not the cause of Gero's arrest. The arrest was *precipitated* by Phiffer's assertion that she had just seen Walters driving a blue pickup truck . . . And when the truck was stopped, Phiffer's identification was confirmed by the remarkable facial resemblance of Gero to the photo that the police had of Walters." (Petitioner's Appendix A, p. A-11-12) (emphasis added)

Although the First Circuit did not repeat the fact at this point of its opinion, the identification by Phiffer and the photographic similarity was further corroborated by the Petitioner's coincidental Phoenix identification and his reluctance to actively protest his arrest.

Subsequent to the Petitioner's arrest, eyewitnesses to Walter's crimes and at least one close friend of Walters' identified the petitioner as Walters in a photo array which included photos of both the Petitoner and Walters. Although such subsequent erroneous identification did not contribute to the mistaken arrest of the Petitioner, it does

suggest that the mistake by the arresting officers was, indeed, reasonable.

5. On the Facts of This Case, Neither Supervisory Personnel Nor the Municipal Employer Could Be Liable On the Basis of Arresting Officers' Mistaken Belief That Petitioner Was Walters.

The Petitioner has not disputed that the Pittsfield police had probable cause to arrest Eric Walters for the Sayers/Sinopoli/DeCelles felony assault. The issue of liability turns, therefore, on whether the arresting officers were reasonably mistaken, under *Hill v. California,* 401 U.S. 797 (1971), that the Petitioner was Walters. The sole participants in the effort to follow Ms. Phiffer's lead, pursue the blue pickup truck, investigate and ultimately arrest its operator were the arresting officers Henault and Sherman, both of whom the jury found to be without liability for the Petitioner's arrest.

There was no evidence introduced that any deficiency in employment, training or supervision led to the field mistake that the Petitioner was Walters. There was no evidence that the acting police chief, Respondent Pires, or the municipal employer, Respondent City of Pittsfield, in any way contributed to the field error leading to the Petitioner's arrest. Moreover, the officers who committed the error, Henault and Sherman, were exonerated from liability by the jury. Without any evidentiary basis for liability, the Respondents would be entitled to judgment as a matter of law.

CONCLUSION

For all the foregoing reasons, the Respondents respectfully request this Court to deny Petitioner's demand for a writ of certiorari to the United States Court of Appeals for the First Circuit.

DATED: December 26, 1984

Respectfully submitted,

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APPENDIX A

PLAINTIFF'S EXHIBIT NO. 27

REPORT TO CHIEF

Date: November 4, 1979 Subject: Incident involving Gene Sayers

Chief:

On the above date while talking to Thomas Fisk of Winter Street, a cab driver for the Yellow Cab, he stated he was a witness to the whole incident. I asked him what happened and he said he was driving his cab down by Ricos when he saw a fight. He said David Sinopoli was on top of this guy when J.D. who he knows from Danny's jumped out of his blue van and started hitting Sinopoli with a club and then started smashing on the front window of a pickup. The pickup then smashed into the van and took off. Mr. Fisk followed J.D. but he stopped on Spring St. He stated he knows who J.D. is from Danny's, he was there when J.D. beat up some girl, (Cindy Phiffer incident). He was supposed to come to the station at 7:00 A.M. this morning but must of had to work late.

Respectfully submitted by
Off. Robert J. Smith (L 8).

APPENDIX B

PLAINTIFF'S EXHIBIT NO. 9

10/22/79

D/M

Cynthia Phiffer called and stated that she had found out who the guy was that hit her on October 16, 1979.

She stated that the guys name was Eric Walters and that he is suppose to be living with a girl by the name of "Pat" who is a Warlock on Brown Street.

We told Off. Marby to look for the yellow van with N.Y. tags and if seen to leave a report on where and the reg. # of the vehicle.

N/M

10/29/79

Check to be made to see if he or someone with that name is a Parolee, Parole Officers (Wayne Boyce)

Probation called]
d/c for ct] Neg.

433-9014

Related to Bill Ryan, said he will talk to Boyce at this time its only Walters, will call if anything different.

/

APPENDIX C

PLAINTIFF'S EXHIBIT NO. 34

Where Taken	By Whom	Date & Time Taken
Pittsfield Police Dept.	Det. Sherman	11/13/79-3:55 P.M.

I, Cynthia A. Phiffer am 20 years of age, born on November 14, 1958, my address is 50 Spring Street, Pittsfield, my tel. no. is 3-4863, my occupation is unemployed and degree of education is 9th grade.

I make the following statement freely and voluntarily to Det. Henault, Sherman of the Pittsfield Police Department after having been told that I do not have to make any statement and that anything I say may be used against me.

Tuesday, November 13, 1979, as a result of knowing a man named J.D. and Erick Walters and knowing that the Pittsfield Police were looking for him and knowing him to be the same person that knocked my teeth out I was by the Pittsfield Police Department and I saw him driving a blue pick up truck. I went into the Pittsfield Police Department and told the detectives what I had seen and the kind of truck he was driving. The detectives had me go with them and we checked all the places he is known to go to and while were were going up First Street, I saw the truck coming out of the parking lot. The only

difference with the truck when I saw it on First Street from when I saw it by the Police Station was that it had wooden boards up the sides of the back but the driver was J.D. The detectives followed the truck up First Street and the truck had to stop behind traffic and the detectives got out and went to the truck and had J.D. get out. This man who they took out of the truck was J.D. or Erick Walters and it was the same man who knocked my teeth out and who the police have a warrant for his arrest. I never saw the truck before today. I was afraid he would see me because he is supposed to carry guns on him so I got down in the back seat of the detectives car and don't know what they did with him after they took him out of the truck.

Time Signed: 4:10 P.M.

APPENDIX D

EXCERPTS OF TRIAL TRANSCRIPT

Gero v. Henault, et al., August 1983 (D. Mass 1983)

Testimony of Anthony J. Pires

Q. [By Mr. Dibble] Physical description, height, weight, hair color, things identifying characteristics, what information did you have on October 17th with regard to the description of the person J.D., Eric Walters?

A. On the [Phiffer] assault and battery report left by Officer Finn?

Q. That's right.

A. It states that he is six-foot-two, two hundred pounds, shoulder-length blond hair, possible beard and mustache, scars on left forearm.

A. Yes.

Tr. at 513

Q. [By Mr. Dibble] Was there a description [Exhibit 14] given of this J.D. Dean from Lanesboro, Mass.?

A. They further described the person about six-foot-two, two hundred and twenty pounds, long blond hair, beard and mustache.

Q. Anything else?

A. Also that the person has slash marks on his arm.

Q. Slash marks on his arms?

A. Yes, sir.

Tr. at 552

A. [Exhibit 15] is a report from Officer Dermot Sporbert to the Detective Bureau with reference to the incidents and the assault on November 2nd, 1979.

. . . .

Q. [By Mr. Dibble] What does the officer put in this report—what did he say, what was his report?

. . . .

A. Barrett was described by the officer as a white male, six-foot-two, a hundred and eighty-five to a hundred and ninety pounds, medium build, beard and brown frizzy hair.

Tr. at 553

Q. [By Mr. Dibble] Was there any description given by Mr. DeCelles in his statement with particular reference to the lower part of the first page of Plaintiff's Exhibit #16, is there a description of this fellow involved in the assault, the sentence that says "this guy with the club"?

A. Yes, sir.

Q. What does it say?

A. This guy with the club was medium build, was wearing a flannel shirt. He had a beard and long hair. I think his hair was blond or a light red or brown.

Tr. at 559

Q. [By Mr. Dibble] Now, what was Sayers description of the [563] driver of the blue van, looking at the middle of that [564] first paragraph?

A. The driver hopped out, a white male, mustache, about five-foot-eleven, blondish-brown hair, shoulder

length, straight, wearing I believe a sweatshirt, blue dungarees—that is about it.

Tr. at 563-564

Testimony of Dale J. Gero

Q. [By Mr. Dibble] What were the differences that you were able to point out from the photographs?

A. The man in the photograph had a different shaped hairline than mine. The shape of his beard was different than mine. He had a V-shaped scar in the middle of his forehead, and he had a darkened front tooth.

Tr. at 61

APPENDIX E

DEFENDANT'S EXHIBIT R